TRANSCRIPT OF RE

SUPREME COURT OF THE UNITED

OCTOBER TERM

No. 240.

THE UNITED STATES MUTUAL ACCIDENT
PLAINTIFF IN ERROR,

vs.

THERESA A. BARRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED
THE EASTERN DISTRICT OF WISCONSIN.

FILED MARCH 26, 1904.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

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1 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

Circuit Court of the United States of America for the Eastern District of Wisconsin.

At a stated term of the circuit — of the United States for the eastern district of Wisconsin begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the fifth day) of October, A. D. 1885—present, the Honorable Charles E. Dyer, district judge, presiding; F. H. West, marshal; Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

THERESA A. BARRY
vs.
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION. } At Law.

Be it remembered that heretofore, to wit, at a stated term of said court begun and held, according to law, at the city of Milwaukee, on the first Monday (being the seventh day) of January, A. D. 1884, and on the one hundred and fifteenth day thereof, to wit, on the first day of July, A. D. 1884, the following proceedings were had, to wit:

Order Docketing Case on Removal.

THERESA A. BARRY
vs.
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION. } At Law.

2 This day came the defendant, by its counsel, Messrs. Finches, Lynde & Miller, and presented to the court copies of the process, pleadings, and proceedings in this case certified from the county court for Milwaukee county, in this district, pursuant to an order of said court removing the cause to this court, including copies of the petition of said defendant for such removal and of its bond required by law therefor and of said order of removal. Whereupon it is ordered by the court that the said copies be filed, and that the cause be entered on the law docket of this court and be proceeded with in the same manner as if it had been commenced here by original process; which said copies are as follows:

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,
vs.
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend

the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you ac-
3 cording to the demand of the complaint.

CHAS. M. BICE,
Plaintiff's Attorney.

P. O. address, Milwaukee, Milwaukee Co., Wis. Office, #108 Grand Ave.

STATE OF WISCONSIN, *Milwaukee County,* } ss:

J. H. Robinson, being duly sworn, says that on the 15th day of April, 1884, at the city and county of Milwaukee and State of Wisconsin, he served the within summons upon the within-named defendant, The United States Mutual Accident Association, by then and there delivering to and leaving with Daniel E. Murphey, as the proper agent of said defendant in this State, a true copy of said within summons. Affiant further says he personally knows the said Daniel E. Murphey to be the agent of the within-named def't corporation.

J. H. ROBINSON.

Subscribed and sworn to before me this 16th day of April, 1884.
CHAS. M. BICE,
Notary Public.

(Endorsed:) Filed April 23, 1884. Christoph Paulus, clerk.

4 EXHIBIT A.

No. 794. Division AA. $5,000.

The United States Mutual Accident Association of the City of New York. (Copyright secured.)

This certificate witnesseth, That The United States Mutual Accident Association, in consideration of the warranties and agreements made to them in the application for membership and of the sum of four dollars, do hereby accept John S. Barry, by occupation, profession, or employment a physician, residing in Vulcan, State of Michigan, as a member in division AA of said association, subject to all the requirements and entitled to all the benefits thereof.

The principal sum represented by the payment of two dollars by each member in division AA of the association, as provided in the by-laws (which sum, however, is not to exceed five thousand dollars), to be paid to Theresa A. Barry (his wife), if surviving (in the event of the prior death of said beneficiaries, or any of them, said sum shall be paid as provided in the by-laws), within sixty days
5 after sufficient proof that said member, at any time within the continuance of membership, shall have sustained bodily injuries effected through external, violent, and accidental means,

within the intent & meaning of the by-laws of said association and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof, or if said member shall sustain bodily injuries, by means as aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he receives membership, then upon satisfactory proof of such injuries he shall be indemnified against loss of time thereby in a sum not to exceed twenty-five dollars per week for such period of continuous total disability as shall immediately follow the accident & injuries as aforesaid, not exceeding, however, twenty-six consecutive weeks from the time of the happening of such accident.

Provided always, That this certificate is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to, and upon the express agreement that all the statements and declarations made by the member in his application for membership are warranted to be true in all
6 respects, and that said application is referred to and made a part of this certificate; and that if this certificate or any continuance thereof has been or shall be obtained through misrepresentation, fraud, or concealment or if any attempt shall be made by false swearing or suppression of any material fact on the part of the member to obtain any sum under this certificate, then the same shall be absolutely void.

Provided always, That benefits under this certificate shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate, or by the taking poison or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury is the proximate or sole cause of the disability or death; and no claim shall be made under this certificate when the death or injury may have been caused by duelling, fighting, wrestling, lifting, or by over-exertion, or by suicide (felonious or otherwise, sane or insane), or by sunstroke, freezing, or self-inflicted injuries, or when the death or injury may have happened in consequence of war, riot, or invasion, or of riding or driving races, or of vol-
7 untary exposure to unnecessary danger, hazard, or perilous adventure, or of violating the rules of any company or corporation, or when the death or injury may have happened while the member was, or in consequence of his having been, under the influence of intoxicating drinks, or while employed in mining, blasting, or wrecking, or in the manufacture, transportation, or use of gunpowder or other explosive substances, or while engaged in, or in consequence of, any unlawful act.

And these benefits shall not be held to extend to disappearances nor to any case of death or personal injury unless the claimant under this certificate shall establish by direct and positive proof

that the said death or personal injury was caused by external violence and accidental means and was not the result of design either on the part of the member or of any other person.

Provided always, That if the member shall travel or be beyond or without the limits of travel or residence hereinafter prescribed without first obtaining from this association, through its secretary, a special permit in writing, then this certificate shall be wholly void as to all accidents occurring beyond such limits. Said limits of travel and residence are as follows, viz.:

The inhabited portions or civilized abodes of the United States, the Dominion of Canada & Newfoundland, and coastwise
8 by regular lines of passenger or mail conveyance from port to port on the Atlantic or Pacific coast or Gulf of Mexico, or to and from any European port, but in no event to include any other voyage upon the high seas without special permit therefor from the secretary of this association.

No indemnity shall be paid for loss of time resulting from accident occurring while the member is without or beyond such limits.

Provided always, That all sums which may be paid by way of indemnity to the member by virtue of this certificate shall be accounted in diminution of the principal sum, so that in case of subsequent death or injury during the continuance of this certificate and within the year in which such indemnity may have been paid the total amount to be paid by the association shall not in any case exceed the sum of five thousand dollars.

Claims under this certificate are payable only at the office of the association at New York, & this certificate is subject also to the following conditions:

1. The member is required to use all due diligence for personal safety and protection, and to notify the secretary of this association immediately, and in writing, of any change from the occupation, profession, or employment under which this certificate is
9 granted. This certificate shall be wholly void as to all accidents occurring in any occupation, profession, or employment or exposure not named or incident to the occupation under which he receives membership, unless he shall have first procured from this association, through its secretary, a written permit therefor.

(The classification by occupation being well defined & understood, it should be borne in mind that the protection is not strictly limited to the occupation stated in the application in the sense that no claim shall be admitted for injuries received outside of the stated occupation, for there are a great variety of accidents not provoked or brought about by any particular business or occupation, but which are incident to the general duties of every-day life and must be regarded as belonging in common to all classes and conditions of men and covered alike by all certificates whether of the "preferred" or as "hazardous" divisions.)

2. In the event of any accidental injury for which claim may be made under this certificate, immediate notice shall be given in writing, addressed to the secretary of this association at New York, stating the full name, occupation, and address of the member, with

full particulars of the accident and injury; and also in case of death resulting from such injury immediate notice shall be given, in like manner, and failure to give such immediate written notice
10&11 shall invalidate all claims under this certificate; and unless direct and affirmative proof of the same and of the death or duration of total disability shall be furnished to the association within six months from the happening of such accident, then all claims accruing under this certificate shall be waived and forfeited to the association.

3. No suit or proceedings at law or in equity shall be brought to recover any sum herein, unless the same is commenced within one year from the time the right of action accrued.

4. No claim shall be payable under this certificate unless any medical adviser of the association shall be allowed to examine the person of the member in respect to any alleged injury or cause of death when and so often as may be reasonably required on behalf of this association.

5. All the provisions and conditions aforesaid & a strict compliance therewith during the continuance of this certificate are conditions precedent to the issuing of this certificate.

In witness whereof The United States Mutual Accident Association of the City of New York has cause- these presents to be signed by its president and attested by its secretary, & delivered at the office of the association in the city of New York, State of New York, this twenty-third day of June, one thousand eight hundred and eighty-two.

CHARLES WEET, *Pres.*
JAMES R. PITCHER, *Sec'ty.*

12 *Complaint.*

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,

vs.

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

The above-named plaintiff, by her attorney, Charles M. Bice, states and alleges—

That the defendant above named is a corporation, duly organized and created as such under and by virtue of the laws of the State of New York, for the purpose of doing insurance, and represented as such by its proper agents in this State.

That on the 23rd day of June, A. D. 1882, in consideration of the payment of the premium of four dollars by one John S. Barry to defendant, & other good & sufficient considerations, the def't duly made & executed its policy of insurance in writing and delivered the same to the said John S. Barry, husband of plaintiff herein.

That by the terms of said contract or policy of insurance the def't insured the said John S. Barry, as a physician, against death

caused by accident or bodily injuries happening to him, effected through external, violent, or accidental means, in the sum of five thousand dollars for such time as the said John S. Barry
13 should continue to pay the defendant the assessments or premiums as provided in said policy, a copy of which is hereto annexed, marked Exhibit "A," and made a part of this complaint.

That the said policy, among other things, also provided, & the def't therein agreed, that in case of the death of the said John S. Barry by accident as aforesaid it would—upon receiving proofs of the same within sixty days from the happening of such accident & due proofs of the same or death caused thereby—pay the said sum of $5,000 to Theresa A. Barry, wife of the said John S. Barry and pl'ff herein.

That on or about the 20th day of June, 1883, and while said policy was in full force and effect, at the town or village of Iron Mountain, in the State of Michigan, and while the said John S. Barry was attending to the duties of his profession, to wit, that of a physician, and wholly without his fault, it became necessary for him to step or jump from a platform or walk to the ground beneath about four feet downwards and in doing so and in lighting upon said ground he unexpectedly received an accidental jar and sudden wrenching of his body caused by said jump or step downward and by coming in contact with the said ground beneath, as aforesaid, all of which was unexpected on his part and wholly without his fault or negligence.

14 That the said jarring of his person and wrenching of his body caused as aforesaid was the immediate cause of, and directly produced, a stricture of the duodenum, from the effects of which the said John S. Barry continued to grow worse until, on the 29th day of June, 1883, he, on account of the same, died.

That the said John S. Barry and this plaintiff have in every respect and particular fulfilled and carried out and performed the terms, conditions, & requirements of said contract or policy of insurance and the by-laws to which the same refers, on their part to be performed; and pl'ff avers that promptly, to wit, on or about the 15th day of July, 1883, and within the time required by said policy, which is six months from the death of the assured, she caused due proofs of said accident & death to be served upon def't as provided in said policy, but def't refused and still refuses to pay said sum of five thousand dollars to plaintiff or any part thereof, and the same has long since been due and wholly unpaid.

Wherefore this plaintiff demands judgment against the said defendant for the sum of five thousand dollars, together with interest on said amount from the 15th day of July, 1883, at seven per cent., & for costs herein.

CHAS. M. BICE,
Pl'ff's Att'y.

15 STATE OF WISCONSIN, } ss:
Milwaukee County, }

Theresa Barry, being duly sworn, says that she is the plaintiff mentioned in the foregoing complaint; that she has read the same & knows the contents thereof, and that the same is true of her own knowledge, except those matters therein stated on information and belief, and as to those matters she believes it to be true.

THERESA BARRY.

Subscribed and sworn to before me this 25th day of April, 1884.

CHAS. M. BICE,
Notary Public.

[Endorsed:] (Filed May 2, 1884. Christoph Paulus, clerk.)

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,
vs.
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

You will please take notice that you are required to produce upon the trial hereof the piece or pieces of the intestines removed from the body of John S. Barry for examination, or in default thereof parol evidence concerning the same will be given on the trial.

Yours, &c, FINCHES, LYNDE & MILLER,
Defendant's Attorneys.

Milwaukee, May 26, 1884.
To C. M. Bice, Esq., plaintiff's attorney.

(Endorsed:) Filed May 26, 1884. Christoph Paulus, clerk.

16 *Answer.*

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,
against
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

The defendant above named, by Finches, Lynde and Miller, its attorneys, answers the complaint of the above-named plaintiff as follows:

First. The defendant admits and alleges that it is a corporation duly incorporated & organized under and by virtue of the laws of the State of New York as an accident insurance company on the co-operative or assessment plan.

Second. Defendant alleges that on or about the 21st day of March,

1883, the said John S. Barry, deceased, made application to said defendant for membership & accompanying said application with the membership fee of $4.00; that the said John S. Barry was duly accepted as a member of the association, defendant, in division AA & classified according to his occupation as a physician, and that on or about the said 21st day of March, 1883, a certificate of membership in the said association, defendant, was issued to said John S. Barry, deceased, numbered 4258: that said certificate, as defendant is informed & believes, is in possession of the plaintiff in this
17 action, and defendant begs leave to refer to and makes the same a part of this answer.

Third. The defendant admits that on the 22nd June, 1883, the said John S. Barry died at Vulcan, Mich.; that the said defendant was notified of his death, and that said plaintiff has demanded and said defendant has refused to pay the said sum of five thousand dollars in said complaint mentioned.

Fourth. The defendant denies each and every other of the allegations in the said complaint contained.

Wherefore defendant demands judgment that the said complaint be dismissed with costs.

FINCHES, LYNDE & MILLER,
Def't's Att'ys.

STATE OF NEW YORK, }
City & County of New York, } ss:

James R. Pitcher, being first duly sworn, on oath says that he is the secretary of the United States Mutual Accident Association of the City of New York, the defendant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant is that it is a corpo-
18 ration; that the deponent is an officer of the same, to wit, its secretary, and that his knowledge is derived from the application for membership signed by said John S. Barry, dec'd, telegrams, letters, & other communications received by defendant from the representatives of said deceased and the plaintiff, and information derived from William Bro. Smith, the attorney of defendant, and from the physicians and surgeons employed by defendant in investigating the claim made by plaintiff and upon which this action is brought.

JAMES R. PITCHER.

Subscribed & sworn to before me this 22nd day of May, A. D. 1884.

A. ETTLINGER,
Notary Public (34), *N. Y. Ct. Co.*

STATE OF NEW YORK, }
City & County of New York, } ss:

I, Patrick Keenan, clerk of the city and county of New York, and

also clerk of the supreme court for the said city & county, the same being a court of record, do hereby certify that A. Ettlinger, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general
19 purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 22nd day of May, 1884.

[SEAL.] PATRICK KEENAN, *Clerk.*

(Endorsed:) Filed May 26, 1884. Christoph Paulus, clerk.

Notice of Trial.

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,

vs.

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

Notice of trial and notice of issue.

Issue of fact for jury joined May 19, 1884.
C. M. Bice, pl'ff's att'y; Finches, Lynde & Miller, def't's att'ys.

Please take notice that the above-entitled action will be brought to trial & an inquest taken therein at the June term of the above said court, to be held at the court-house, in the city of Milwaukee, in the said county of Milwaukee, on the 2nd day of June next, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Yours, &c., CHAS. M. BICE,
Pl'ff's Att'y.

May 21, 1884.

To Finches, Lynde & Miller, att'y- for def't.

Service of a copy of above notice admitted this 21 day of May, A. D. 1884.

FINCHES, LYNDE & MILLER,
Att'y- for Def't.

(Endorsed:) Filed May 23d, '84. C. Paulus, clerk.

20 *Petition for Removal to U. S. Court.*

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,

against

UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

To the county court for Milwaukee county:

The petition of the defendant above named respectfully shows that at the date of the commencement of the above-entitled suit it was, ever since has been, and still is a citizen of the State of New York, and that the plaintiff at the time of the commencement of the above-entitled suit was, ever since has been, and still is a citizen of the State of Wisconsin.

That the above-entitled action was commenced by the service of summons in said county on the 15th day of April, 1884.

That the matter in dispute exceeds the sum or value of five hundred dollars ($500.00) exclusive of costs, and the June term of said court, commencing on the second day of June, 1884, is the first term of said court at which said cause could be tried, and that it has not yet been tried; and your petitioner herewith presents a bond, with

21 William H. Miller, a good and sufficient surety, for its entering at the next term of the circuit court of the United States for the eastern district of Wisconsin, on the first day of its next session, a copy of the record in the above-entitled cause, copies of said process against petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded if said circuit court shall hold that this cause was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in said suit if special bail was requisite therein; and your petitioner hereby offers to furnish such additional security as this honorable court shall require.

Wherefore your petitioner prays this court to accept said petition and bond, and that the said above-entitled cause may be removed to the circuit court of the United States for the eastern district of Wisconsin, and that all proceedings in said county court by stayed, and that said court proceed no further in said action, pursuant to the provision of the acts of Congress; and that your petitioner may have such other, further, and different relief as your petitioner may be entitled to; and your petitioner will ever pray, &c.

Milwaukee, Wis., May 26, 1884.

THE UNITED STATES MUTUAL
ACCIDENT ASSOCIATION,
Per FINCHES, LYNDE & MILLER,
Its Attorneys.

(Endorsed:) Filed May 27, 1884. C. Paulus, clerk.

22 Know all men by these presents that we, The United States Mutual Accident Association, as principal, and William H. Miller, as surety, are held and firmly bound unto Theresa A. Barry in the sum of two hundred and fifty dollars, to be paid to the said Theresa A. Barry, her executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the 26th day of May, A. D. 1884.

Whereas the above-bounden The United States Mutual Accident Association has petitioned the county court of Milwaukee, State of Wisconsin, for the removal of a cause therein pending, wherein Theresa A. Barry — plaintiff and The United States Mutual Accident Association is defendant, to the circuit court of the United States for the eastern district of Wisconsin, pursuant to the provisions of the acts of Congress in that behalf:

Now, therefore, the condition of the above obligation is such that if the above-bounden The United States Mutual Accident Association shall enter in such circuit court on the first day of its next session a copy of the record in such suit, copies of the process against petitioner, and of all the pleadings, depositions, testimony, and other proceedings in the cause, and shall pay all costs that may be
23 awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation shall be null and void; otherwise of force.

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, [SEAL.]
By FINCHES, LYNDE & MILLER, *Its Att'ys.*
WM. H. MILLER. [SEAL.]

In presence of—
BENJ. K. MILLER, JR.
EDDIE J. CONROY.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

I, William H. Miller, of Milwaukee, county of Milwaukee, and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Wisconsin and a property-holder therein; that I am worth the sum of five hundred dollars, in property within the State of Wisconsin, over and above all my debts and liabilities and exclusive of property by law exempt from execution.

WM. H. MILLER.

Subscribed and sworn to before me this 26th day of May, A. D. 1884.

BENJ. K. MILLER, JR.,
Notary Public, Mil. Co., Wis.

(Endorsed:) Filed May 27, '84. C. Paulus, clerk.

24 *Order of Removal to U. S. Court.*

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,
against
UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

Upon reading and filing the petition of said defendant for removal of the above-entitled action to the circuit court of the United States for the eastern district of Wisconsin and the bond thereto attached, showing that all the proceedings for the removal of said action to the said circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Finches, Lynde & Miller, attorneys for said petitioner, it is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the bond filed is hereto approved, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the United States circuit court for the eastern district of Wisconsin copies of the record and of the process against said petitioners, and of all pleadings, depositions, testimony, and
25 other proceedings in the cause, and that all further proceedings in this court are hereby stayed.

By the court:

J. E. MANN,
County Judge.

Milwaukee, May 27th, 1884.

(Endorsed:) Filed May 27, 1884. Christoph Paulus, clerk.

March Term, 1884.

THERESA A. BARRY
against
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

Money demand.

Chas. M. Bice.

APRIL 23, 1884.

And now comes the plaintiff in the above-entitled action, by Chas. M. Bice, Esq., her attorney, and files her summons, endorsed as follows:

STATE OF WISCONSIN, *Milwaukee County,* } ss:

J. H. Robinson, being duly sworn, says that on the 15th day of April, 1884, at the city & county of Milwaukee & State of Wisconsin,

he served the within summons upon the within-named defendant, The United States Mutual Accident Association, by then and there delivering to and leaving with Daniel E. Murphy, as the proper agent of said defendant in this State, a true copy of said within summons. Affiant further says he personally knows the said Daniel E. Murphy to be the agent of the within-named def't corporation.

J. H. ROBINSON.

26 Subscribed and sworn to before me this 16th day of April, 1884.

CHAS. M. BICE.

May 2, 1884.—Complaint filed.
May 26, '84.—Answer filed. Notice to produce filed.
May 27, '84.—Petition, bond, and order of removal filed as follows:

Upon reading and filing the petition of said defendant for removal of the above-entitled action to the circuit court of the United States for the eastern district of Wisconsin and the bond thereto attached, showing that all the proceedings for the removal of said action to the said circuit court of the United States for the eastern district of Wisconsin pursuant to the statute in such case made and provided have been taken, and that said suit is one proper for such removal, and on motion of Finches, Lynde and Miller, attorneys for said petitioner, it is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the bond filed is hereto approved; and the clerk of this court is hereby directed to transmit & deliver to the clerk of the United States circuit court for the eastern district of Wisconsin copies of the record, and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause, and that all further proceedings in this court are hereby stayed.

27 By the court:

J. E. MANN,
County Judge.

Milwaukee, May 27th, 1884.

THE STATE OF WISCONSIN, *ss:*

County Court, Milwaukee County.

THERESA A. BARRY, Plaintiff,
against
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

MILWAUKEE COUNTY, *ss:*

I, Christoph Paulus, clerk of the county court in and for the county of Milwaukee and State of Wisconsin, do hereby certify that I have compared the foregoing copy with the original entries, and that the same is a true and correct transcript of the whole and every part of all entries, orders, and minutes in the books of

the clerk in the above-entitled action, and that the process, pleadings, and other papers hereunto annexed are true copies of all the papers filed in the above-entitled action, and that the same are herewith transmitted to the United States circuit court for the eastern district of Wisconsin pursuant to order of court dated May 27th, 1884.

In testimony whereof I have hereunto set my hand and affixed the seal of said county court, at Milwaukee, the 25th day of
28 June, A. D. 1884.

[SEAL.] CHRISTOPH PAULUS,
Clerk of the County Court, Milwaukee County, Wisconsin.

(End of certified copies from State court.)

Proceedings in U. S. Court.

And same day (July 1, 1884.)—Depositions received per express and filed.

September 19, 1884.—Depositions received from post office and filed.

October 21, 1884.—Deposition received from B. K. Miller, Jr., and filed.

November 10, 1884.—Depositions on behalf of defendant received per express and filed.

December 12, 1884.—Plaintiff's notice of trial for January term, 1885, filed.

First Trial.

March 12, 1885.—This day came the parties, by their counsel, Mr. C. M. Bice appearing for the plaintiff and Messrs. W. P. Lynde and B. K. Miller, Jr., for the defendant, and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit, F. Y. Mansfield, Nathan Brick, Albert H. Atkins, Alexander McK. Stewart, James K. Ilsley, Charles H. Anson, John Porter, Thomas Nelson, Michael Duffy, A. H. Cleveland, Thomas J. Freeman, and James Finn, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and, the trial not being concluded, the same was adjourned until to-morrow morning.

March 13, 1885.—This day came the parties, by their coun-
29 sel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

March 14, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until Monday morning next.

March 16, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid, being charged by the court, retired to their room, under the charge of a sworn officer, to

deliberate upon their verdict and with leave to bring in a sealed verdict to-morrow morning.

March 17, 1885.—This day came the parties, by their counsel, and the jurors of the jury aforesaid came into court, and, not having agreed upon their verdict and not being likely to agree, they were thereupon discharged and the cause continued.

September 7, 1885.—Plaintiff's notice of trial for October term, 1885, filed.

September 16, 1885.—Defendant's notice of trial for October term, 1885, filed.

And now, at this same term, to wit, October term, A. D. 1885, and on the forty-ninth day thereof, to wit, December 4, 1885, the following proceedings were had, to wit:

30 *Second Trial.*

THERESA A. BARRY, Plaintiff,
vs.
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant. } At Law.

This day came the parties, by their counsel, Mr. C. M. Bice appearing for the plaintiff and Messrs. B. K. Miller, Jr., and George P. Miller for the defendant, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, Peter J. Harger, P. J. Pierce, Samuel Hadfield, James S. Peck, Peter Wright, John B. Buell, H. M. Northrop, William Langton, J. F. Schwalbach, John D. McDonald, A. B. McCumber, and E. E. Ely, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and, the trial not being concluded, the same was adjourned until to-morrow morning.

December 5, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until Monday morning next.

Verdict.

December 7, 1885.—This day came the parties, by their counsel, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid, being charged by the court, retired to their
31 room, under the charge of a sworn officer, to deliberate upon their verdict, and afterwards came into court, and on their said oaths, respectively, do say that they find the issue herein in favor of the plaintiff, and assess the damages to the said plaintiff at the sum of five thousand seven hundred and seventy-nine dollars and seventy cents; and came the defendant's counsel and moved the court for a new trial for reasons filed, as follows:

Motion for New Trial.

U. S. Circuit Court, East. Dist. of Wisconsin.

THERESA A. BARRY, Plaintiff,

vs.

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

And now comes the above-named defendant, by Finches, Lynde & Miller, its attorneys, and moves to set aside the verdict herein and for a new trial because said verdict is contrary to law and against the evidence.

Milwaukee, Wis., Dec'r 7th, 1885.

FINCHES, LYNDE & MILLER,
Def't's Att'ys.

December 17, 1885.—This day came the parties, by their counsel, and the motion of the defendant for a new trial came on to be heard, and was argued by Mr. B. K. Miller, Jr., on behalf of the
32 defendant, and submitted by Mr. Bice, for the plaintiff, without argument, when the court took the same under consideration.

And afterwards, to wit, on the sixty-second day of said term, to wit, on the twenty-second day of December, 1885, the following proceedings were had, to wit:

Order Overruling Motion for New Trial.

THERESA A. BARRY, Plaintiff,
vs.
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant. } At Law.

This day came the parties, by their counsel, and, on consideration of the motion of the defendant for a new trial and the arguments of counsel thereon, it is ordered by the court that the said motion be, and hereby is, overruled.

Judgment.

Whereupon it is considered and adjudged by this court now here that the plaintiff do have and recover of the said defendant, The United States Mutual Accident Association, the sum of five thousand seven hundred and seventy-nine dollars and seventy cents damages, so as aforesaid assessed by the jury, together with one hundred and eighty-nine dollars and thirty-five cents, her costs about her said suit in this behalf by her expended, and that she have execution therefor.

33 Judgment roll filed December 22nd, A. D. 1885.
EDWARD KURTZ, *Clerk.*

Damages	$5,779 70
Costs	189 35
	$5,969 05

And same day (December 22, 1885) bill of exceptions signed and filed as follows:

34 *Bill of Exceptions.*

United States Circuit Court, Eastern District of Wisconsin.

THERESA A. BARRY, Plaintiff,
versus
THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Defendant.

Be it remembered that on the 4th day of December, 1885, the above cause was reached in its order upon the calender and called; and, the parties having announced themselves ready, a jury of twelve good and lawful men of said district were duly called and sworn and the trial of said cause proceeded, C. M. Bice, Esqr., appearing for the plaintiff and Finches, Lynde & Miller for the defendant.

The plaintiff, to maintain the issue on her part, offered in evidence the certificate or policy of insurance, a copy of which is set out in the plaintiff's complaint; to which offer the defendant, by its counsel, objected, for the reason that the complaint did not state facts sufficient to constitute a cause of action; which objection was overruled by the court, and the defendant excepted.

35 Defendant objected, also, that complaint alleged no assessment.

COURT: I will take the testimony, subject to the objection.

Thereupon the policy or certificate was received in evidence and read to the jury.

The plaintiff then introduced and read in evidence the deposition of James R. Pitcher, of New York, who is secretary of the defendant company, which deposition was as follows, to wit:

36 My name is James R. Pitcher. I reside at Short Hills, New Jersey, and my occupation is secretary of the United States Mutual Accident Association, the defendant; am 40 years of age. During the years 1883 and 1884 I was and am now secretary of the defendant. On the 23d day of June, 1882, there were 804 members in division AA in the association; on the same day, 1883, 4,803 members; the same day, 1884, 5,626 members. During the months of June and July, 1883, the association defendant, in case of a death in division AA, could have levied a two-dollar assessment on at least 4,803 members, that number being then insured in that division. The only members that were exempt from

the two-dollar death assessment are those who became members subsequent to the death for which the assessment is made. If the defendant had desired to pay the loss occasioned by the death of John S. Barry the amount to be paid would have been $5,000. The assessment levied next prior to June 29th, 1883, was levied on the 1st day of June, 1883. On December 31st, 1884, there were 62,098 in division AA. If, at the time a death is reported and a claim is proved, there is sufficient funds to the credit of division AA the loss is paid from those funds without making a specific assessment. If there are not sufficient funds at that time, then an assessment is made. On June 29th, 1883, the defendant had on hand belonging to class AA 2,060.15. The printed book hereto annexed is a copy of the by-laws of the defendant for 1882–'83. They have not been altered or amended since; which said by-laws are as follows, to wit:

37 *By-Laws of the United States Mutual Accident Association, Amended February 28th*, 1883. *Incorporated October* 11, 1877.

38 *By-Laws of the United States Mutual Accident Association, Amended February 28th*, 1883. *Incorporated October* 11, 1877.

39 *Officers.*—1883.

President: Chas. B. Peet, of Rogers, Peet & Co.
Vice-president: William Brinckerhoff, 36 Pine St., N. Y.
Secretary: James R. Pitcher, 320 & 322 Broadway, N. Y.
Treasurer: C. T. Hazen, 320 & 322 Broadway, N. Y.

Board of directors, *ex officio.*

Chas. B. Peet, president, of Rogers, Peet & Co.
Wm. Brinckerhoff, vice-president.

For one year:

Wm. Bro. Smith, counsel.
Leopold Wormser, of Harlem & Westchester Clothing Co.
William Wade, of Wade & Cumming.

For two years:

William Gibson, with Morrison, Herriman & Co.
James S. Leeds, 5 & 7 Dey St., N. Y.
E. S. Parker, of The Kilgour Blue Stone Co.

For three years:

Ferdinand P. Earle, of Earle's Hotel.
John H. C. Nevius, 486 Broadway, N. Y.
James Buckley, gen. eastern passenger agent Erie R. R.

Examining finance committee.

B. P. Frink, New York city.
Frank R. Chambers, New York city.
Frank O. Bennett, New York city.
Surgeon: Edwin F. Ward, M. D., 33 West 36th St., N. Y.
Counsel: Wm. Bro. Smith, 322 Broadway, N. Y.
Bank of deposit: Ninth National Bank of the city of New York.
Office of the association: 320 & 322 Broadway, N. Y.

40 *By-Laws. Amended February 28th*, 1883.

(Copyright secured.)

Article 1.—Name, location, and object.

SECTION 1. This association shall be known as the United States Mutual Accident Association of the City of New York.

§ 2. The principal office of this association shall be located at the city of New York.

§ 3. The object of this association is to collect and accumulate a fund to be held and used for the mutual benefit and protection of its members (or their beneficiaries), who shall have sustained while members of the association bodily injuries, whether fatal or disabling, effected through external, violent, and accidental means.

In furtherance of this object and to prevent speculative insurance, weekly indemnity will be limited, so far as practicable, to the
41 money value of the time lost by members of the association by reason of wholly disabling injuries.

§ 4. The fund mentioned in the preceding section shall be collected and accumulated in divisions according to the classification of members, as provided in article II, and the fund on accumulation of one division shall not be applied to or used in any way for the benefit of any other division, except as provided in article II, section 12.

Article II.—Membership.

SECTION 1. Any person, a resident of the United States or the Dominion of Canada, over eighteen and under sixty years of age, of sound mind and body, in good health and temperate habits, is eligible to membership in this association under such classification, limitations, and restrictions, as are hereinafter set forth.

§ 2. The members of this association shall be classified by the board of directors in divisions according to the schedule of risks of the association adopted by said board, said divisions to be designated as follows;

Preferred risks,		division	A.
"	"	"	AA.
"	"	"	AAA.
Ordinary	"	"	B.
Medium	"	"	C.
Hazardous	"	"	D.
Extra hazardous,		"	E.

42 Members shall be eligible to one division only, except in the following cases, viz:

1st. Members eligible to divisions A or AA whose weekly earnings or income amount to or exceed fifty dollars, shall be eligible to membership in both of said divisions, or in divisions AA and AAA.

2d. Members eligible to divisions B, C, or D whose weekly earnings or income amount to or exceed the weekly indemnity provided for in two of said divisions shall also be eligible to membership in the division next below in grade.

§ 3. All applications for membership shall be referred to the secretary, who shall issue certificates of membership upon receipt of such proof as to the applicant's qualifications and eligibility as may be prescribed by the board of directors.

§ 4. All applications for membership received after January 1st, 1882, must be accompanied by four dollars membership fee, which shall be returned to the applicant if the application be rejected, and after January 1st, 1884, all applications must be accompanied by five dollars membership fee.

§ 5. Any member who shall change his occupation to any other more hazardous than classified in the division to which he belongs shall, immediately upon such change, cease to be a member of said division, but may upon a new application in the prescribed form, and upon payment of the fee of two dollars, be classified according to his new occupation; and any member who shall receive an

43 accidental injury in an occupation classified as more hazardous than the one named in his certificate of membership shall be entitled to receive only such amount of weekly indemnity (and in case of death his beneficiary shall receive only such death benefit) as are provided in these by-laws for the division in which such occupation shall be classified.

§ 6. Each member of this association shall use his influence in furthering the interests of the association. He shall furnish the secretary of the association with his full name and address; shall notify him of every permanent change in the same, and, in view of any long-continued absence from the place of his address, shall designate some person to whom all notices of the secretary may be sent during such absence, and shall also provide for the payment of any assessment that in such time may be made.

§ 7. Each member of the association shall constitute an advisory officer of the division to which he belongs for the town or city in which he may reside; and it shall be his duty to promptly report to the secretary any information he may have or obtain concerning any alleged accidental injuries occurring to any member of his division in the association.

§ 8. Upon receiving notice of dues or assessments each member shall promptly remit the amount thereof to the secretary of the association. Notices sent to the last given address of any member shall be considered as proper legal notification.

44 § 9. Any member who shall not remit the amount of his assessment or annual dues within thirty days from the date of the notice thereof, except when the board of directors shall have

extended the time for payment, shall forfeit his claim to membership and have his name stricken from the roll, but any such person may be restored to membership upon payment of all dues, or, at his option, by making a new application for membership in the prescribed form, for which a new certificate will be issued upon surrender of the one forfeited and payment of the membership fee of four dollars, always subject, however, to the approval of the board of directors.

A member so reinstated shall not be entitled to any indemnity for loss of time or injuries sustained between the time of such forfeiture and reinstatement, and no person who has forfeited his membership shall be eligible to reinstatement unless at the time of application therefor he is of sound mind and body, in good health and of temperate habits, and under the age of sixty-five years.

§ 10. Members of this association may at any time resign, thereby relinquishing all claims upon or privileges under said association: Provided, however, That all dues and assessments shall have been paid to the date of the resignation.

§ 11. Each and every certificate of membership and reinstatement is to be issued and accepted upon the express agreement that the statements and declarations of the applicant are true in all respects, and the application containing said statements and declara-
45 tions is to be referred to in and made a part of the certificate of membership.

Each certificate of membership shall be issued subject to the classifications, conditions, limitations, and exceptions prescribed by the board of directors; such classifications, conditions, limitations, and exceptions to be included in and made a part of each certificate.

§ 12. Divisions A and AA of this association shall in all respects be separate and distinct, and shall be liable to assessment only for the payment of indemnity to their own members and their just proportion of the expenses of the general management of the association. On and after March 1st, 1883, and until such time as each of the following divisions have a sufficient membership to enable each to pay all death benefits in full, the moneys and accounts of divisions AAA, B, C, D, and E shall be kept as one fund, and all moneys received for membership fees, assessments, and annual dues in said divisions shall be applied to the payment of losses in all of said divisions as may be required under the limitations of each certificate, as prescribed in the schedule of classification.

Article III.—Officers and elections.

SECTION 1. The officers of the association shall consist of a president, vice-president, secretary, treasurer, and a board of directors, composed of the president and vice-president *ex officio* and nine other members.

46 § 2. All officers except the secretary, treasurer, and board of directors shall be elected annually for the term of one year. The person receiving the highest number of ballots for each or either office shall be declared elected, and shall hold office during their re-

spective terms and until their successors are elected and qualify, unless removed for proper cause.

The treasurer shall be appointed by the board of directors.

The secretary elected at the annual meeting for the year 1879 shall hold office during good behavior and until removed, as provided in article V of these by-laws.

The board of directors elected at the annual meeting for the year 1880 shall divide themselves by lot into three classes of three each; the first class to serve until the annual election of 1881; the second class to serve until the annual election of 1882; the third class to serve until the annual election of 1883. At the annual election of 1881 and at every annual election thereafter there shall be elected three members of the board of directors, who shall serve for three years and until their successors are elected.

§ 3. The president, with the approval of the board of directors, may appoint for each and every of the United States one or more honorary vice-presidents, to hold office during the fiscal year for which appointment is made.

§ 4. Each member shall have an equal vote at all meetings
47 of the association, but no member shall be allowed to vote at any meeting who may be in arrears for dues or assessments.

Any member may delegate his vote to a proxy, who must also be a member of this association.

Article IV—Duties of officers and board of directors.

SECTION 1. It shall be the duty of the president to preside at all meetings of the board of directors and of the association. He shall sign all orders drawn on the treasurer attested by the secretary. He shall call special meetings of the association at the written request of fifteen members, the purpose of the meeting to be specified in the call—such meetings not to be held in less than ten days after the call.

He shall appoint at the meetings of the board of directors next preceding each annual meeting of the association three members of the association (not members of the board of directors) as an examining finance committee, who shall make an examination of the books, accounts, and vouchers of the secretary and treasurer and report upon the same at the next annual meeting.

§ 2. The president shall be recognized as the legal representative of the association, and as such shall have power to appoint committees, act in the conduct or defense of all matters at law, and to execute all papers legally demanded or requisite in connection
48 with the affairs of the association, subject, however, to the instructions with respect to the same of the board of directors.

§ 3. The vice-president shall, in the absence of the president, be invested with the same powers and perform all the duties of the president, or, in case of a vacancy caused by death, resignation, or removal, until the vacancy is filled by an election held for that purpose.

§ 4. In case of the absence of the president and vice-president from

a meeting the board of directors or the association, as the case may be, shall select one of their number to preside.

§ 5. The secretary shall keep a correct record of all the transactions of the association and board of directors, attest all orders drawn on the treasurer, receive all applications for membership, as hereinbefore provided, countersign all certificates of membership, and give notice of all special and annual meetings of the association or board of directors. He shall give notice of all assessments to each of the members of the divisions upon which the assessments are made; receive all moneys due to the association and pay the same over to the treasurer, taking his receipt therefor. He shall keep an accurate account with each division of the association and with each of the members thereof, and shall notify all members when in arrears.

He shall receive as compensation for his services a salary determined at the rate per annum of one dollar for each and every
49 certificate of membership in force within the fiscal year for which said salary is paid, the same to be divided into monthly installments, payable by order of the president upon the treasurer of the association.

He shall give a good and sufficient bond to the association for the faithful performance of his duties, in such reasonable amount as the board of directors shall from time to time determine, the penalty not exceeding in amount of dollars double the number of members of the association.

The secretary shall be entitled to and the association shall provide all necessary clerical assistance for properly conducting the business of the association.

§ 6. The treasurer shall receive all moneys from the secretary, giving his receipt therefor. He shall pay all orders signed by the president, attested by the secretary, and audited by the board of directors. He shall keep a correct account of all moneys received and paid out, and shall present a monthly statement of the same to the board of directors. His books shall at all times be open to the inspection of the board of directors. He shall, when required, deliver to the board of directors or to his successor in office all the money, books, papers, and valuables of the association which may be in his possession.

He shall give a good and sufficient bond to the association for the safe keeping of all moneys and valuables in his possession belonging to the association and for the faithful performance of his duties, in such amount as the board of directors shall determine.

50 § 7. It shall be the duty of the board of directors to exercise a general supervision of the business of the association; they shall prescribe the form and manner of applications for and the conditions of membership, and shall prescribe such forms and measures for determining the classifications, qualification, and eligibility of persons applying for membership, not inconsistent with these by-laws, as they may deem necessary; decide on all claims for indemnity for disabilty or death caused by accident; order assessments to pay death and indemnity losses, and for such other purposes as are hereinafter provided.

They shall direct in regard to the depositing of moneys received by the treasurer, and approve all expenditures and payments out of the funds of the association (except such as may be directly ordered by the association), and audit all bills for the same.

They shall exercise a general oversight over the books, accounts, moneys, and property of the association. They shall execute and carry into effect the provisions herein contained not otherwise provided for, and such other measures as may from time to time be imposed upon them by this association, and shall report their proceedings to the association at each annual meeting and at such other meetings as the same may be required.

§ 8. In case of vacancies arising in any official position the board of directors shall fill the same by appointment until a special
51 meeting shall be called to fill such vacancy by election, or, if no special meeting be called, until the next annual meeting.

§ 9. The board of directors shall have the power to reject any application for membership referred to them by the secretary which they may deem to be to the interest of the association to reject.

Article V.—Expulsions, misrepresentations.

SECTION 1. Any member of this association charged in a written communication to the board of directors, signed by at least three members of the association, with any felony, or other indictable offense, fraud, habitual drunkenness, or with abusing his privileges, or otherwise misbehaving himself, shall be by said board summoned to appear before it to answer said charges.

A copy of the said summons and of the said charges in writing shall be served upon the person charged at least thirty days before the day set for hearing the proofs thereof; such service to be made personally, or, where personal service cannot after due diligence be made, by mailing said copies to the last known address of the person charged (postage thereon prepaid) at least forty days before the day set as aforesaid.

The person charged shall be heard in person or by attorney, and may offer witnesses or other proper evidence to disprove the
52 charges, after which, if adjudged guilty by three-fourths of the board present at the trial, he shall be expelled from the association.

§ 2. Failure or neglect to respond to the summons of the board of directors on the part of any such member after service of summons and charges, as in section 1 provided, shall be considered as *prima facie* evidence of guilt, and he shall be expelled from the association.

§ 3. If the board of directors shall be cognizant of any misdemeanor or malfeasance in connection with or incompetency of any officer of the association, or if such shall be certified to them as provided in section 1 of this article, they shall hold a meeting, at which twelve members of the association, previously notified by the secretary (or, where charges are made against the secretary, by the president or vice-president), shall attend. Such twelve persons shall constitute a court for the hearing of the case, and if the party shall be

adjudged guilty he shall be expelled from the association, three-fourths of the members of such court voting in favor of such expulsion. His office shall be declared vacant and filled by appointment of such court, subject to article IV, section 8; but the same provisions with reference to appeal shall apply as provided in section 4 of this article. The provisions as to notice and manner of trying charges prescribed in sections 1 and 2 of this article shall apply to cases covered by this section.

§ 4. In all cases of expulsion of members or officers the person so accused shall have the right of appeal to the association in annual meeting.

53 § 5. Misrepresentation, fraud, or concealment by or on the part of any member or by any other person through his procurement or arrangement in order to obtain any benefit by reason of his membership or any failure to comply with the requirements of these by-laws shall work a forfeiture of all claims to benefits from the association.

Article VI.—Meetings, etc.

SECTION 1. The association shall hold an annual meeting on the last Wednesday in February of each year hereafter, except the year 1882, in the city of New York. Any special meeting that may be called as hereinbefore provided shall also be held in said city.

§ 2. The board of directors shall hold a regular meeting at such time in each month as they may elect to consider such business as may come before them and such other special meetings as the interests and business of the association may require.

§ 3. The association, in annual or special session, may make such rules for its government and the transaction of business (not provided for in these by-laws) as it may deem proper, providing that no rule shall be adopted except by a two-third vote of the members present.

§ 4. The board of directors may make such rules for their government and the transaction of their business (not provided for in these by-laws) as they may deem proper.

54 § 5. Fifteen members shall constitute a quorum for the transaction of business at meetings of the association, and four members shall constitute a quorum for the transaction of business at meetings of the board of directors, but a less number may in either instance adjourn.

Article VII.—Assessments, dues, and benefits.

SECTION 1. Upon sufficient proof that a member of one of the divisions of this association shall have sustained bodily injuries effected through external, violent, and accidental means within the intent and meaning of these by-laws and the conditions named in the certificate of membership, and such injuries alone shall have occasioned death within ninety days from the happening thereof, the board of directors shall immediately order an assessment of two dollars upon each person who was a member of the division to which deceased belonged at the time of such death, and shall pay the amount so

collected, according to the following schedule of classification (always subject to diminution to the extent of the weekly indemnity paid to said member within twelve months preceding his death), to the person or persons whose names shall at the time of the death of such member be found recorded as his last designated beneficiaries, if surviving, or, in event of their prior death, as provided in section 2 of this article, subject to article II, section 1.

55 Schedule of classification.

To members of	division	A,	not exceeding	$5,000.00
"	"	AA,	"	5,000.00
"	"	AAA,	"	5,000.00
"	"	B,	"	4,000.00
"	"	C,	"	3,000.00
"	"	D,	"	2,000.00
"	"	E,	"	250.00

§ 2. When two or more persons are designated by a member as his beneficiaries the indemnity provided for in this article shall be paid to the beneficiaries, share and share alike, and in the event of the prior death of one or more of the beneficiaries the share of the deceased beneficiaries shall be paid (1st) to the widow and children of the deceased member, if surviving, share and share alike, or to the survivor of them entirely or (2d) to his next of kin in the order and within the limitations prescribed by the New York statute for the distribution of the personal property of intestates, except when the member shall otherwise direct in his application for membership or in and by his last will and testament, and legal notice of the probate of such will shall have been served upon the secretary of the association before the payment of the loss shall have been made.

§ 3. Or if any member shall sustain bodily injuries by means as aforesaid which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of
56 any and every kind of business pertaining to the occupation under which he receives membership, then, upon satisfactory proof of such injury, he shall be indemnified against loss of time thereby in the sum specified in the following schedule of classification, graded according to the division of which he shall be a member, viz:

Division	A,	not exceeding	$25.00	per week.
"	AA,	"	25.00	"
"	AAA,	"	25.00	"
"	B,	"	20.00	"
"	C,	"	15.00	"
"	D,	"	10.00	"
"	E,	"	5.00	"

for such period of continuous total disability as shall immediately follow the accident and injuries as aforesaid, not exceeding twenty-six weeks from the time of the happening of such accident.

§ 4. Funds for payment of weekly indemnity shall be derived from an assessment of two dollars upon each member of the division upon which such assessment shall be made. When the fund so collected shall be insufficient to pay in full the claims for which such assessment was made, then payment in full for weekly indemnity upon any such claim shall not exceed in amount a *pro rata* share of the sum so collected whenever the board of directors shall so order.

§ 5. Any member of this association who is now or shall hereafter become a member of any other association of a like character,
57 or who has taken out or shall hereafter take out insurance against accident in any insurance company, and the aggregate amount of weekly indemnity to which he shall be entitled exceeds his weekly earnings or income, he shall be entitled to receive from this association only such proportion of the weekly indemnity provided for in these by-laws as his weekly earnings shall bear to the aggregate amount of weekly indemnity to which such member shall be entitled to from all of said associations and companies when the board of directors shall so direct.

All arrears owing by members at the time of auditing claims for weekly indemnity shall be deducted from such indemnity.

§ 6. Whenever the proceeds of an assessment upon a division for weekly indemnity or death loss are more than are required for paying sufficiently the immediate claims for which the assessment is made, the balance therefrom shall go into the treasury of the association to the credit of such division, and, together with the amount arising from the payment by each admitted member of four dollars for membership fee and the amount received from the payment of one dollar by each member for annual dues, shall be used in defraying the necessary expenses of the division and its just proportions of the expense of the board of directors in conducting the affairs and business of the association.

§ 7. Whenever the amount in the treasury of the association to the credit of a division which may accrue in any manner is
58 sufficient to pay a proper claim upon a division for weekly indemnity or loss of life by accident, it shall be used for that purpose in place of the usual assessment when the board of directors shall so order.

§ 8. Each member of this association shall pay the sum of one dollar annually for dues, payable with the last assessment issued of each year.

Article VIII.—Rules, amendments.

SECTION 1. Every rule that may be adopted by the association shall remain in force until abrogated or suspended by a two-third vote of the members present at the meeting at which a rule is abrogated or suspended.

§ 2. These by-laws may be revised or amended at any annual meeting of the association by a two-third vote of the members present, but no amendment shall be considered unless the same shall have been submitted in writing to the board of directors and ap-

proved by them at the last meeting prior to the meeting of the association at which action upon the proposed changes is to be taken.

59 Thereupon the plaintiff offered in evidence the proof of loss as furnished by the heirs of Dr. Barry, deceased, and sent to the defendant. It is dated the 13th of July, 1883, and is as follows, to wit:

60 *Proofs of Death.*

Certificate of officiating clergyman.

I, Rev. M. Orth, do hereby certify that I am a Catholic priest of St. Mary's church, at Norway, Mich., and that I officiated in my clerical capacity on the first day of July, 1883, at the funeral of Dr. John Samuel Barry, who died at Vulcan, Mich., on the 29th day of June, 1883, and that I knew and recognized the remains to be the dead body of the said John S. Barry.

M. ORTH.

Sworn to and subscribed before me this 13th day of July, 1883.

CHARLES B. KNOWLTON,
Justice of the Peace.

Undertaker's Certificate.

I, Robert Johnason, do hereby certify that I am an undertaker residing at Norway, Mich., and as undertaker I attended the funeral of Dr. John S. Barry, and that he was interred in Rumnesec cemetery on the first day of July, 1883, and that I knew and recognized the remains to be the dead body of the said John S. Barry.

ROBERT JOHNASON.

Sworn to and subscribed before me this 13th day of July, 1883.

CHARLES B. KNOWLTON,
Justice of the Peace.

Friend's Statement.

Name of deceased: John S. Barry.
Residence: Vulcan, Menominee Co., Michigan.
Occupation: Physician.
Were you present at the time of his death? Shortly after.
61 Where was he and what was he doing? At home in bed.
Was he intoxicated or under the influence of spirituous liquor at the time? No.
Did you see and recognize the remains of deceased after death? Yes.
Of what or from what cause did the deceased die? See physician's statement.
What was the age of deceased at time of death? Thirty years.
Was the deceased personally known to you? Yes.
Membership number, as per certificate, 4258 AA.

CHARLES I. McELROY.

Sworn to and subscribed before me this 13th day of July, 1883.

CHARLES B. KNOWLTON,
Justice of the Peace.

Attending Physician's Statement.

In evidence in claim of John S. Barry, of Vulcan.

1st. What is your name and address in full? Frederick L. Hirschmann.

2nd. When and where did you graduate? Detroit Medical Coll., 1873.

3rd. Are you now engaged in the practice of your profession? Yes.

4th. How long were you personally acquainted with deceased? 5 months.

5th. Do you know that he is the same person that is described in certificate of membership No. 4258, division AA, and in the preceding affidavits? Yes.

6th. Did you at any time attend or prescribe for this person for any accidental injuries? No.

62

7th. When were you first consulted or called? June 23rd, at 2 a. m.

8th. Where did you first attend him? At his home, at Vulcan.

9th. Did you make any examination of his person? Yes.

10th. What, if any, exterior or visible sign did you find as to any personal bodily injury caused by external and accidental violence? A small lump (tumor), painful to the touch, in the right side, below the stomach. This did not appear until about the third day.

11th. What local and constitutional symptoms existed during his illness, and what treatment did you adopt? Pain, vomiting, sleeplessness, jaundice, tenesmus.

12th. What was the precise nature of the injury and its extent? Inflammation of duodenum, from jarring (jump).

13th. How long was he actually confined to the house? 9 days.

14th. When did you last attend him? June 29th, 1883.

15th. What, in your opinion, was the cause of his death? Inanition and bile circulating in blood.

16th. Do you know whether or not the deceased was under the influence of intoxicating drink to any extent at the time of your first visit or of the happening of the accident? He was not.

17th. Did deceased ever have or was he at the time of accident afflicted with or suffering from any constitutional or local disease, hereditary or acquired? If so, to what extent did such disease contribute to or cause a fatal result? Know of none.

18th. How do you understand the injury was received?

63

The doc. jumped from a platform while leaving the house of a patient and shook his internal organs badly.

And I further state that I have no interest in the payment of this claim, either as creditor or otherwise, and that I am not related to

the deceased or his beneficiary in any manner whatever, and that I have answered all the preceding questions to the best of my ability.

(Physician's signature) F. L. HIRSCHMANN, M. D.

Sworn to and subscribed before me this 13th day of July, 1883.

CHARLES B. KNOWLTON,
Justice of the Peace for Menominee County, Michigan.

If any physician was called in consultation his statement should be attached.

Statement of Eye-Witness.

1st. How long have you known deceased? Five months.

2nd. State when and where he was injured? At Iron Mountain, Mich., June 22nd, 1883.

3rd. What was he doing at time of injury? Attending to his legitimate business. To get from the house to the ground he had to jump from a platform.

4th. What was the nature of his injury? An internal strain.

5th. Give in detail all the circumstances attending the injury? Dr. Barry, Dr. Crowell, and myself went to see a patient. To get out of the house we had to jump from a platform. Dr. Barry jumped first and came down quite hard—so much so that Dr. Crowell and I spoke of it. He said it did not hurt much. We drove home and he went to bed.

64 6th. Give the names and post-office address or residence of all persons who were present at the time deceased was injured? Dr. Crowell, Iron Mountain, Mich.

7th. What were you doing at the time? Standing on the platform.

8th. Was deceased under the influence of spirituous liquor at the time of his injury or had he been drinking intoxicating liquor just prior thereto? No.

9th. Are you related to deceased or his beneficiary in any way or have you any interest in the payment of this claim? No.

(Signature) F. L. HIRSCHMANN, M. D.
J. ADDISON CROWELL, M. D.

STATE OF MICHIGAN, }
County of Menominee, } *ss:*

On this 14th day of July, 1883, before me, a justice of the peace in and for the said county and State, personally appeared the above-named F. L. Hirschmann and J. A. Crowell, to me well known, and to whom I have read the foregoing questions and answers and all the matter above stated, and who, after being fully advised in the premises, subscribed the above statement in my presence and made oath that the foregoing statements and each and all of them are full and true and without reservation.

[SEAL.] (Signature) CHARLES B. KNOWLTON,
Official Title, Justice of the Peace.

Post-office address, Norway, Mich.

Statement of Beneficiary.

STATE OF MICHIGAN, } ss:
65 *County of Menominee,* }

Theresa A. Barry, being duly sworn, says that she is the beneficiary named in the application of John S. Barry to become a member of the United States Mutual Accident Association of the City of New York; that the said applicant, now deceased, left no last will and testament, to the best of the deponent's knowledge and belief; that she is 26 years of age and has read the foregoing statements and each and every part thereof and knows the contents of the same, and that they are true to her own knowledge, except *as to* in regard to which she has been informed, and that she verily believes said information to be true.

(Signature) THERESA A. BARRY.

Sworn to and subscribed before me this 14th day of July, 1883.

[SEAL.] (Signature) CHARLES B. KNOWLTON,
Title of Official Justice of the Peace.

Post-office address, Norway, Mich.

(If deceased left a will a certified copy, with proof of probate, must be attached.)

66 Thereupon the plaintiff, THERESA A. BARRY, was called as a witness on her own behalf; and, being duly sworn, testified as follows:

I am the plaintiff. The person named in the policy, John S. Barry, was my husband. In 1883 my husband and I lived at Vulcan, Michigan. He was a physician.

Q. In what condition was your husband's health up to the time of this accident?

COURT: Up to the time it was claimed he was injured.

Which question was objected to by defendant as immaterial. Objection overruled, and defendant excepted.

A. Very good; unusually so. I knew my husband, Mr. Barry, six years previous to our marriage. I recollect the day he came home sick. It was the 20th of June, 1883. He arrived home about 6 o'clock in the afternoon. I knew he was not feeling well from his looks; he was unusually pale—distressed looking—as though he was suffering. He tried to eat and attempted to drink some tea. He sat at the table about 5 minutes. He said his stomach was distressed. He was very sick. He was perfectly well up to that time. He went to bed. He didn't vomit until later in the evening. I sent for Dr. Jones, who arrived, I think, between 8 and 9 o'clock. I attended Dr. Barry personally until he died. He never retained anything on his stomach any length of time after that. He vomited every few minutes. The vomiting commenced a little before Dr.

Jones got there. He vomited probably 10 times a day, sometimes more, and it was more frequent towards the last. He died June 29th, 1883. He came home sick on the 20th and died on the 29th.

67 We had Doctor Jones and Dr. Hirschmann and Dr. Mason, of Milwaukee. The doctors had a number of consultations. They had one a couple of days before he died, at which Drs. Hirschmann, Mason, and Jones were present. He died on Friday and, I think, was buried on Sunday.

Thereupon the plaintiff called CHARLES T. MCELROY, who, being duly sworn, testified as follows:

I live at Norway, Michigan, and knew Dr. Barry intimately. I am his brother-in-law. I saw him the 20th of June, 1883, at Norway, about noon, prior to his going to Iron Mountain. I saw him on his return from Iron Mountain. Norway is situated between Iron Mountain and Vulcan.

Q. Did you learn of Dr. Barry's illness any time after that?

Which question was objected to by defendant as incompetent and immaterial. Objections overruled, and defendant excepted.

A. I did learn he was very sick and went and saw him the next day. He was in bed and had a very sick-looking paleness. His face was greenish and yellow—pallid—and he was vomiting and wrenching almost continually while I was there. I called frequently after that and sat up with him almost all the time of his illness. He kept vomiting continually and attempting to vomit. Very little fœcal matter passed through him during this time. He died June 29th, 1883, and was buried July 1st. Dr. Barry's general health was very good. I never knew him to be sick. He was an athlete—strong and robust; weighed about 160 to 175 pounds, and was about 6 feet high. I never knew of his having a stoppage of the bowels before. I assisted in preparing the proofs of loss. I saw Mr. Knowlton go to the post office with the proof of loss.

Q. State what kind of weather it was from the 29th of June

68 for the following four or five days.

Which question was objected to by defendant as irrelevant, incompetent, and immaterial. Objections overruled, and defendant excepted.

A. It was very warm weather during his entire sickness. The day he was buried was an extremely hot day. I think the thermometer stood 103 in the shade, and for the week following it was very warm.

Thereupon the plaintiff read in evidence the deposition of CHARLES B. KNOWLTON, who, being duly sworn, testified as follows:

I am 36 years old; reside in Menominee, Michigan, and am an insurance agent. I know Mrs. Barry, and was acquainted with her husband in his lifetime. I was located in Norway when Mr. Barry

died. I knew of his having an accident insurance policy in the defendant association, and at the request of the plaintiff I did, on or about the 5th day of July, 1883, notify the said defendant of the death of Dr. Barry. Said notice was, as near as I can recollect, the written notice of the death by accident, giving the date of his death and the number of the policy by which he was insured, which notice I sent through the mail, postage paid, addressed to the secretary of the association at New York city, properly addressed to either the post-office box or the number of the street. About July 9th, 1883, I received from the defendant a telegram, a copy of which is as follows:

NEW YORK, *July* 9, 1883.

C. B. Knowlton, Norway, Michigan:

Telegraph me date, place, and cause of Dr. Barry's death at once.

JAMES R. PITCHER, *Secretary.*

69 I immediately on receipt of the telegram replied as follows: "Duodenitis, caused by jump while attending professional duties." A few days later I received through the mail a letter from the secretary of the defendant, dated July 10th, 1883, which is as follows:

C. B. Knowlton, J. P., Norway, Michigan.

DEAR SIR: Enclosed you will please find blanks for proof of claim in case of Dr. John S. Barry, and which you will please have executed as soon as possible and return to this office without delay. We telegraphed you for full information yesterday (9th inst.), but up to present time have received no reply. Please forward such particulars as you may possess at your earliest convenience, and oblige,

Very truly yours,

JAMES R. PITCHER, *Secretary.*

Enclosed with this letter I received blanks for proof of claim. I assisted in preparing the proofs of death, and when duly executed they were by me mailed, properly addressed, to the defendant at New York city and the postage thereon prepaid, during the month of July, 1883. I never received any communication from the defendant since I mailed to them said proofs of death.

Thereupon the plaintiff called F. L. HIRSCHMANN as a witness, who, being duly sworn, testified as follows:

I live at Norway, Michigan, and am a physician and surgeon. I have charge of the Norway hospital of the Republic Iron Co. I hold a diploma from and am a graduated physician from Detroit Medical College. I graduated in April, 1873, and have been practicing since. I was acquainted with Dr. Barry. I had known him three or four months before his death. I knew him quite well. We both had practiced in the same town. I believe Dr. Barry to have been a healthy man previous to the 20th of June, 1883. He was

the picture of health. He was large, well developed, muscu-
70 lar, tall and active. He was quite an athlete. I was called in the month of June to attend him professionally. I had never heard him complain of anything previous to that time. I was called to attend him on June 23d, between 2 and 3 o'clock in the morning. When I came I found him in bed.

I was present with D. Barry when he made the jump at Iron Mountain on June 20th. We went to Iron Mountain to visit a patient with Dr. Crowell. The patient lived upstairs in a house which was behind the drug store. We saw the man and then came down the stairs. We could make a short cut to the drug store by jumping off a platform which was between 4 and 5 feet from the ground. In order to get to the drug store any other way we would have to walk to the front of the building and around the block, making a walk of about a block and a half, but by getting off the platform and going to the drug store that way it was just a short cut to get into the back part of the store. Dr. Crowell and I jumped from the platform and I alighted all right. Just after we had jumped Dr. Barry jumped, and he came down so heavy that it attracted our attention and we both turned around & we both remarked that it was a heavy jump, and I asked him, "Doctor, are you hurt?" and he said, "No; not much." I have an indistinct recollection of his leaning against the platform when he jumped, but not sufficiently to state positively. If I were to jump I would jump and strike on my toes, and if I had any distance to jump would allow my knees to give. The way Dr. Barry came down it sounded to us as if he came down solid on his heels, so much so that we both turned around and remarked, "Doctor, you came down heavily." And I asked him, "Are you hurt?" and he said, "No; not much." I heard the noise. It was a singular jump and sounded like an inert body. We then went with him to the drug store.

71 Q. By the COURT: Did you see him alight on his feet?

A. He struck so soon after we struck that we didn't have any time to turn around and see how he struck. Immediately after that we went to the drug store and met some gentlemen there. We stopped there a few minutes and talked. I had some business elsewhere and told Dr. Barry I would call for him on the way home. From there I went to another drug store, and then went to see some friends, and left word there for the Doctor to call for me. After we left Iron Mountain the Doctor looked pale—that is, on our return from Iron Mountain to Norway. It may have been half an hour after the jump. I rode home with him. On the way home I thought he was looking sick, and spoke to him of his being sick and told him he was looking bad. My attention was directed to him because he was looking pale; and he was driving and he drove in a careless manner, and would occasionally close his eyes; and I asked him, "Doctor, are you sick—are you faint?" This attracted my attention. I drove to Norway with him. I offered to drive for him, but he wouldn't let me. We got to Norway a little after 5 o'clock. He stopped in the drug store a little while, and complained of feeling bad, and I left him there. Dr. Barry's home was two miles from there. I was called

to attend Dr. Barry on the morning of June 23d. I saw him in his bed-room leaning on his arm, trying to vomit. He complained of being very sick; he looked haggard and pale. I stayed there until quite late in the morning. I was called between 2 and 3 in the morning and stayed until daylight. I don't remember that I administered any medicine. Dr. Jones was also in attendance. Dr. Jones and I held a consultation about his condition.

Q. Did Dr. Barry complain of pain?

72 Which question was objected to by defendant as incompetent, irrelevant, and immaterial.

By the COURT: It is proper for the witness to state, generally, for instance, that he complained of pain; but the witness will not state anything Dr. Barry said.

To which ruling the defendant excepted.

A. He complained of pain.

Q. In what part of his body?

Same objections by defendant; which objections were overruled, and defendant excepted.

A. He complained of pain in the region of the stomach.

Q. Had anything passed through him?

A. Nothing had passed through him in that time, from what I could gain from Dr. Jones.

COURT: Were you in medical consultation with him in that time? Answer. Yes.

Thereupon the defendant moved to strike out the last two answers as hearsay; which motion was overruled, and defendant excepted.

I attended Dr. Barry at different times until he died. I was there from 2 to 4 times daily; sometimes all day.

Q. Had there anything in the shape of fœcal matter passed through him at all up to the time of his death?

A. I don't remember of any. There may have been a trace of fœcal matter. That would indicate that there was some obstruction somewhere along the intestinal canal. One would naturally look in the direction where the pain was. The duodenum is the portion of the intestine near the stomach.

Q. What was your diagnosis of the trouble?

Which question was objected to by defendant as a mere conclusion. Objection overruled, and defendant excepted.

A. We diagnosed an obstruction of the intestine—that of
73 the duodenum. Dr. Mason, Dr. Jones, and myself had a consultation, and made an examination of the body or person of Dr. Barry. We all examined the parts where he complained of pain.

Q. What did you conclude?

Which question was objected to the same as before. Objections overruled, and defendant excepted.

A. We agreed that he had an inflammation of the duodenum sufficient to produce an obstruction, which is called duodenitis. This consultation was had two days before Dr. Barry's death. I was present on the day of his death. Dr. Barry was buried on Sunday, July 1st, 1883. It was a very hot day. The weather was very hot before he died and until some time after the funeral. I assisted in the post-mortem examination of Dr. Barry. It occurred, I think, on the morning of July 3d; it might have been July 4th. Dr. Cameron, Dr. Crowell, Dr. Jones, and I were there. I did the cutting. We took him out of the grave, but not out of the coffin. He was so bloated and disfigured that we couldn't taken him from the coffin. We opened his clothes and cut his shirt open and opened him. We examined him with a view to seeing whether he had an obstruction or not. We found that the piece of the intestine next to the stomach—the duodenum, the lower part of it—was discolored. It was a greenish-yellow color, and somewhat constricted. I mean by constricted it was narrowed. The narrowing closed the passage entirely. The piece of intestine, on examination, we found to be constricted and closed up entirely. I took a piece of the intestine—the occluded piece—and separated it and handed it to Dr. Jones, and asked him to name the condition of things he found. There was not
74 any word passed between us before that concerning the condition.

Q. I will ask you what was the conclusion there of the four physicians on the post mortem?

Which question was objected to same as before. Objection overruled, and defendant excepted.

A. That the bowel was totally occluded; there was no passage through it. We found the intestine immediately beyond the part diseased occluded, and the whole of the balance of the bowel down to the anus was inflamed and congested. We opened it and found a bloody, thick, slimy substance and decomposed blood. Between the point of contraction and the stomach it looked healthy. The blood we found was of the same character as Dr. Jones', and I saw — immediately after the death. When Dr. Barry died Dr. Jones and I cleaned him and laid him out, and as he died there passed from him quite a large amount of this bloody mucous ooze; it was so bad that it was necessary to plug up those parts. This same substance was contained in the entire intestinal canal, from the point of the constriction down. The appearance of this constriction was that the intestine was flat. Before cutting away that section of intestine I had it in my hands examining to find if there was any trouble, and where. The inner portion of the intestine would slip, one upon another, until I got to the part where the occlusion was, but there was no slipping there; it was just as if I had one slip between finger and thumb. I then cut through this part and passed it to the other physicians and asked their opinion, which was given to me. It con-

firmed mine. From the fact of the surfaces not rubbing I judged they were adherent. I believe that adherence was caused by
75 inflammation. Decomposition set in early; it looked gangrenous. Dr. Barry was bloated beyond recognition 12 hours after death. The bowel was not twisted upon our examination. If gases formed inside the bowels, if there had been a twist it might destroy that condition of things. If there had been an adhesion which was not very firm I presume the gases might pass through that and loosen it. Obstruction in the bowels is common, but there are various kinds of obstructions—from twisting of the bowels, from fœcal matter becoming impacted, or there may be a telescoping of the bowels and a hernia, and there could be an obstruction of the bowels from external pressure.

Q. I will ask you whether a jar to the body would be sufficient to produce a twisting or knotting of the bowel?

A. I think it could be produced in that way. It could produce a condition of things favoring occlusion. That would apply to the duodenum as well as any other portion of the intestine. It might be produced by a man striking in such a position as to jar that part of the bowel that would spring; that might produce an obstruction of that bowel. It could produce pressure, so that there would be no movement of the bowel upon itself. In the human system there is a net-work of nerves, and these are supplied to the intestines as well as to other organs of the body. I think a jump might affect one portion of the bowel and not the rest, through the nerves that supply that portion. From what I know of the history of Dr. Barry and of the alleged accident, in my opinion the producing cause of the obstruction with which he was troubled and died was inflammation of the duodenum, caused by the jump. I believe the jump would be sufficient to do that.

Cross-examination:

76 Dr. Jones was Dr. Barry's assistant at Vulcan. Dr. Jones was attending Dr. Barry when I arrived. I had never attended him previous to this time. I don't know of my own knowledge whether Dr. Barry was sickly or not. When Dr. Barry jumped at Iron Mountain I think I turned around and said, "That is an awful jump; did you hurt yourself, Doctor?" On the former trial of this case I may have stated the question and answer to be, "Did you hurt yourself?" And the answer of the doctor was "Not much." After the jump we went into the drug store and stayed there awhile, and then went out about my business. In the course of an hour or half and hour we drove home. We both got out of the buggy at Norway, and from there he went home alone. I left him there. Br. Barry did the driving. We dropped into the drug store casually. We had no business. A drug store is a stopping-place for us naturally enough. We stopped in the drug store about 20 minutes; nothing particular was done there. I think I got behind the show-case in the drug store and talked with the Doctor. I may have taken a cigar, but did not take a drink. I did not see any

twisting of the duodenum when I saw it. We cut out the major part of the duodenum and perhaps six inches of the intestine. Those pieces, as they were slimy, were placed in a little tin can, and Dr. Jones took that to Vulcan. Dr. Jones took possession of the duodenum and ilium. If Dr. Barry did not die of duodenitis I cannot think of anything else he died of. When we made the post-mortem examination I think we made a thorough examination of the liver and other internal organs. We found the liver of a greenish color. We found the intestine in that shape that it satisfied us all that there was no need of going any further. We did not make a com-
77 plete autopsy. We did not open the brain. We did not pass the probe into the piece of the intestine. We wanted to leave it just as it was. It was about the normal size. I do not think it had the normal appearance. Its color was of a lightish gray. I do not think that discoloration was merely in post-mortem change. I did not make a microscopical examination, and found no occlusion lower in the intestine. I did not pay any particular attention to the lower part of the ilium, near the colon. Our attention was directed to the duodenum. We saw the colon was in an engorged condition and contained this offensive secretion. We cut off a piece of the ilium, and sent it all together. I don't think we cut the ilium open. The duodenum is covered pretty well by the liver. There is no part of the duodenum exposed to the touch from any side. There is no way of getting at it in life except from the symptoms and what the patient says. A pain in another part of the ilium might have been in the same region. I did not make a chemical examination of this bloody mucus; it was an ante-mortem appearance, because it was the same as the discharge just previous to his death. There was no knotting. The size of the duodenum was normal. The caliber of a duodenum is about an inch and a quarter to an inch and a half; sometimes a little larger. The ilium is about the same size. If the gut be narrowed at any point, from an inch and a half down to the diameter of the little finger, it might not show a diseased condition; it might be caused by an old disease. The caliber of the gut can certainly be narrowed by disease. If it is not congenital, and is found on post-mortem examination, it
78 is the result of disease or injury. The duodenum is very well protected. I never heard of any other case like that of Dr. Barry. I never had another case of duodenitis. I have never heard of a duodenum being twisted in my practice. I never knew of it being impacted by fœcal matter. Dr. Barry's was the only case I knew positively was duodenitis. The walls of the duodenum are something less than $\frac{1}{12}$ of an inch thick. A tube of the diameter and thickness of the duodenum if empty would collapse, and I found the duodenum collapsed. I glanced at the duodenum, rubbed it, and found one part of it did not move from the other, and passed it to the other physicians without naming the condition in which I found it. The entire bowel, with the exception of the piece we cut out—that is, below the constriction—contained gas and slime, and the bowel was not collapsed. The part constricted was collapsed. We did not discover any hernia nor any evidence of external press-

ure, except where the constriction was. The part constricted seemed to be adherent. I did not open it. I wanted to leave it as I found it, so that others could examine it. I made several post-mortem examinations; never before on a case of duodenitis. I have never seen similar conditions in reference to the closing of the duodenum in an autopsy, nor have I ever heard of one. There was no sign of any bruise upon the body. There was a little inflammation afterwards, which was the result of some treatment. In a case of obstruction of the duodenum caused by inflammation causing death the evidences of that inflammation would remain after death. The walls of the intestine are composed of several distinct tissues. These tissues are the serous, the muscular, and
79 then the mucus. The mucus is the inside one. The tissues are made up of little cells, and when inflammation sets in these little cells are filled up—that is, infiltrated. I have had no experience with the microscope, and don't know what infiltration is. If a portion of the body is swelled up when he dies that swelling would not go down except on decay, but it may decay very quick. The inflammation will be there after death. The inflammation might disappear otherwise than by decay. There might be some chemical action that might cause a disappearance—that is, by the presence of chemicals. If a man dies with an inflamed organ, after death the signs of the inflammation will be there. Duodenitis is inflammation of the duodenum. It is an inflamed condition of the bowel. It is accompanied by congestion, swelling, and pain. If the bowel permits of it, and it is confined entirely to the mucus membrane, there would be an increased secretion by the organ. The symptoms of duodenitis would be pain in the region of the duodenum. There might be diarrhœa, could be vomiting, and there could be an increase in the temperature and some fever and tenderness upon pressure. When I arrived Dr. Barry may have been retching and vomited a little. He was straining a great deal to have a movement of the bowels; became yellow, jaundiced, and wasted. He didn't keep any food. The jaundice might have occurred from various things; so also might the vomiting. These symptoms are general and not peculiar to any disease. Dr. Barry was thirsty all the time; more so than ordinarily accompanies fever. When he took any fluid he immediately vomited it. If he didn't take anything he would retch as if he wanted to vomit. There was no tenderness in any
80 other part of the bowels.

Q. Now, I have brought you here several specimens on intestinal tract. I would like you to look at them and tell me whether they are normal or abnormal (showing specimens to witness). I have here a portion of the tract; I would like to have you tell me what portion of the tract it is from.

A. I do not pretend to say from what portion of the intestine it was. I know nothing about this specimen. I cannot tell anything about it. I don't know anything about it. There are in the intestines certain features which mark one portion from another, but I have not made them a special study. I do not pretend, upon matters of this kind, to be an expert. I do not know that I pre-

scribed any medicine, but some morphine and some chloral was given—small doses—that were given to relieve pain.

Redirect examination:

I said there was an appearance of jaundice, and that is one of the symptoms accompanying duodenitis. Jaundice is a yellow color you see through the skin, and is the result of bile going into the circulation instead of going out in the usual way. The construction of the duodenum included, I think, the bile duct which comes into the duodenum; and if the bile duct was closed the bile would be absorbed through the liver and that would create the appearance of jaundice. In diagnosing a case we take into account all the symptoms.

Q. Now, what did the whole of the symptoms in this case point to, unquestionably?

To which question defendant objected as before. Objection overruled, and defendant excepted.

81 By the COURT: What, in his opinion, did the symptoms point to or indicate?

A. In connection with what I knew of the case, it pointed to an inflamed state of the duodenum and obstruction. If the difficulty had been lower down the contents of the bowel above would have been vomited. The obstruction being in the duodenum, there could be no fœcal matter in that short space. The fœcal matter obstructed forms gas. When the obstruction is lower down gases form and the condition of the bowels is bloated, called tympanitis. The doctor experienced pain immediately over the region of the duodenum. I would expect pain where the injury was, even though the duodenum might be so far in that the pressure from the outside would not touch it. I think the doctor had morphine in doses of half a grain. The effect of opium is the relief of pain.

Q. What, from your knowledge, whether derived from books or from experience, are the causes of intestinal obstruction?

Which question was objected to by defendant as irrelevant, incompetent, and immaterial.

COURT: Let him state his knowledge, whether derived from books or from his own personal experience.

Objection overruled, and defendant excepted.

A. Injury, either external or internal, or disease or accident. All the intestines except the duodenum are attached to the back to hold them in position. This is not the case with the duodenum. In the case of a jar there is nothing to support the duodenum. We cut off the duodenum at the point of constriction. It was not necessary to run a probe to tell where it adhered. I wanted to leave it just as I found it. Some portions of a man begin to decompose before the man dies, and gangrene could exist, with intestinal obstruction, before death; and the constricted part would be the first that would

show it after death. The constriction that we found upon
82 the post-mortem examination was sufficient to produce death.
Q. Was that, in your opinion, the cause of death?

Which question was objected to by defendant as irrelevant; which objection was overruled, and the defendant excepted.

A. I believe it caused the death of Dr. Barry; that it produced the disease of which he died, which I have called an injury. Part of the duodenum looked gangrenous—that is, the part we cut out. The coloring of the liver would be post-mortem change, caused by the bile. You see that on every autopsy; it explains the greenish color of the liver perfectly.

Division AA.

Office of the United States Mutual Accident Association, 320 & 322 Broadway, New York.

D'R S'R: The receipt of two dollars, in payment of assessment No. 2, for 1883, is hereby acknowledged.
Membership No. 4258.

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

Paid April 19, 1883.

JAMES R. PITCHER, *Secretary*,
Per K. C. ATWOOD, *Cashier*.

(On face of postal card is following address:) John S. Barry, Vulcan, Mich.

Division AA.

Office of the United States Mutual Accident Association, 320 & 322 Broadway, New York.

DEAR SIR: The receipt of two dollars, in payment of assessment No. 3, for 1883, is hereby acknowledged.
Membership No. 4258.

UNITED STATES MUTUAL ACCIDENT ASS'N.

Paid June 9, 1883.

JAMES R. PITCHER, *Secretary*,
Per K. C. ATWOOD, *Cashier*.

(On face of postal card is following address:) John S. Barry, Vulcan, Mich.

83 Thereupon the deposition of B. W. JONES was read, and is as follows, to wit:

My name is B. W. Jones; am 26 years of age, and reside at Vulcan, Michigan; am a physician; was graduated from Rush Medical College, Chicago. I knew Doctor Barry during his life-

time, and knew him five or six years previous to his death. I assisted him in his office. I knew him before he moved to Vulcan. I studied in his office one year in Prairie du Chien, Wisconsin. I never knew him to be troubled with any disease of the bowels; if he had been I should have known it. The symptoms of duodenitis are pain in the region of the stomach, vomiting, and jaundice. I noticed none of these symptoms before June, 1883. I made a diagnosis of his case when I was called to attend him on June 20th, 1883, the first day of his illness. It was inflammation of the duodenum. I had a conversation with the doctor as to the cause of his illness. I attended the post-mortem examination. Doctor Hirschman performed the post-mortem in the presence of us all. He cut the body all open, and we all examined the intestines, duodenum, and stomach. I don't remember as to the kidneys or bladder. I found all the organs healthy except the duodenum. I think the inflammation of the duodenum caused the inflammation of the intestines. I found the duodenum inflamed. In my opinion the cause of his death was inflammation of the duodenum, called duodenitis. I was satisfied the duodenum was closed; the swelling was so great, and nothing had passed. I found it occluded. I attended the doctor during his illness, and was there when he died.

84 The doctor could not retain food during the first day; at the end he retained some. We tried to give him food by the mouth and rectum; neither retained. During his illness he passed a little fæces—that is, clay-colored fæces, and dark-colored fæces, and bloody mucus; it was black decomposed blood and mucus. The causes of duodenitis laid down in the medical books are irritating substances, as are also acids and alkalies, extention of inflammation of the stomach, or extension of the same from the small intestines, blows or wrenches, twisting of the body, or a hard blow.

Q. Suppose a person to be perfectly healthy for years prior at a certain time should jump a certain distance downward, four to five feet, and that should be followed immediately by a retching and vomiting and nothing passing through the system until death, and the person was unable immediately after the jump and then until death to retain food of any kind, and you should discover on post mortem that such a person died from duodenitis, never having had symptoms of this disease prior to the time of such jump or wrench of the body, what, in your opinion, would have been the immediate or producing cause of such duodenitis?

A. I cannot answer that question. The jump might be the cause of duodenitis.

Cross-examination:

I graduated from Rush Medical College in February, 1881. Since that time I have passed six months in Milwaukee and then in Vulcan. Duodenitis is an inflammation of the duodenum. Cold, exposure, and acrid bile are also causes of duodenitis. The principal food I gave Doctor Barry was milk. I think that is all—milk and a little gum arabic mixed with it. Duodenitis is a very rare

85 disease. I gave as medicine bismuth, croton, chloral hydrate, morphine, lime water, cinnamon water, mint water. We gave him through the rectum a little croton oil and tried to move the bowels. We gave him calomel through the mouth; also ice; placed hot fermentations over the stomach. I was present at the post-mortem examination. The peritoneal coat did not present any pathological appearances to the naked eye. The mucus membrane did. The caliber of this section of the intestine was normal.

Q. Did the vermiform appendix contain any foreign body?

A. I do not think we opened it. From the feeling I don't think it contained anything. I think it was permeable. There was no opening into the peritoneal cavity. There was evidence of inflammation, but no evidence of there having been any ulceration. In case of severe duodenitis the inflammation usually extends downwards and causes inflammation of the other intestines. I think the piece of the ileum given to Mr. Smith was inflamed. Its diameter was about normal. The normal diameter of the ileum is about an inch. The external walls of the ileum were smooth. The portions removed were diseased. There was also inflammation in the parts we did not take out. These were the same as the rest. We made no microscopical examination. The inflammation in the various portions of the intestines and duodenum was catarrhal. I think a portion of the colon and duodenum was opened. We found no Pyers' patches. I was not Dr. Barry's partner; I was his assistant at the time he died. After the post-mortem examination the body was reinterred.

86 Redirect examination:

At the last consultation I have mentioned it was concluded that Dr. Barry had duodenitis, including the intestines, from the swelling. There was no constriction of the duodenum. The duodenum was closed by the swelling of the mucous membrane.

Q. Did you discover this on the post-mortem?

A. No, sir; we did not see it. We concluded this from the symptoms.

Q. How did the post-mortem verify your consultation?

A. By showing the evidence of inflammation of the mucous membrane. The caliber of the duodenum was about normal. The swelling had disappeared.

87 Thereupon the plaintiff called Dr. DARIUS MASON, who, being duly sworn, testified as follows:

I have been engaged in the practice of my profession 30 years, in Milwaukee and Prairie du Chien. I have a diploma from the College of Physicians and Surgeons, New York city; have been in practice in Milwaukee eight years. I knew Dr. Barry in his lifetime. For 5 years before his death I knew him intimately. He was a hale, vigorous man. I did not know him to be troubled with any disease of the bowels. I saw Dr. Barry before his death, in June, 1883; perhaps 4 or 5 days before his death. I had a consultation there with Dr. Hirschmann and Dr. Jones. I examined Dr. Barry. Dr.

Barry was very much prostrated with his trouble—was very weak—and was almost constantly vomiting. He complained of a great deal of pain in the region of the stomach. He had some discharges from the bowels, which were discolored and somewhat bloody. The matter he vomited was something of a similar character. I concluded from my examination that Dr. Barry had inflammation of the duodenum. I thought that from his symptoms. Some of the symptoms might indicate some other disease. Taking them all together led me to conclude that he had duodenitis. He was scarcely able to retain anything on his stomach. I don't know that anything passed through him that he ate. If nothing had passed through him that he had eaten from the time he was taken sick until the time of his death, that would indicate that there might be an inflammation somewhere in the tract, and the probabilities are that it was in the stomach, or that whatever was taken into the stomach would meet with this inflamed portion and would be rejected.
88 That might indicate a closing or simply inflammation. If the trouble had been further down there would be the same regurgitation; the hernia would not be located in the same place; if the inflammation had been lower down, there probably would have been no difference in the swelling of the body. There may be a great many causes of duodenitis. It may be the result of an accident. It might be produced by a jump or severe jar of the body.

Cross-examination:

I never saw a case of duodenitis except this one. I don't remember that I ever knew in my practice of a case of duodenitis caused by a jump. Duodenitis is not the rarest disease known. I have not met with it very much in my general practice. The intestinal tract from the stomach to the anus, if stretched out, varies from 24 to 26 feet. The duodenum is 12 inches long. I think there was very little swelling in Dr. Barry's case. The symptoms I have given are the only ones upon which I base my diagnosis of duodenitis. If Dr. Barry did not die of duodenitis, I don't know what he did die of. I couldn't find any other place where he was diseased.

(Witness is here shown the same specimen of intestine as was shown Dr. Hirschmann, and asked whether he can tell what the specimen is.)

A. It is probably a section of the intestine, but I don't think I could tell what portion of the intestine. There are some well-marked peculiarities which distinguish the different portions of the intestine. I would not pretend to say what portion of the intestine such a fragment was from. I do not see anything abnormal or wrong about this specimen of intestine shown me.

89 Redirect examination:

The small portion of the intestine is difficult to distinguish unless a person is constantly examining that portion of the body. There is a general similarity throughout and yet there is a distinc

tion. There is no nicely drawn line where the duodenum ends and the jejunum begins. The jejunum and the ileum merge into each other and have to be distinguished by one's skill. This requires a special pathology.

Recross-examination:

A physician must understand physiology and pathology. This is pathology, and it is an elementary question.

Thereupon the plaintiffs recalled Dr. Hirschmann, who stated that he had made a mistake as to the date of the post-mortem examination. The post-mortem examination was made on July 5th.

Thereupon the plaintiff rested her case, and the above and foregoing was all the testimony offered by the plaintiff.

Thereupon the defendant, by its counsel, renewed its objection, and moved the court to instruct the jury to render a verdict for the defendant, as the facts proven do not justify a recovery; which motion was denied by the court, and the defendant excepted.

The defendant, to maintain the issue on its part, called WILLIAM B. SMITH as a witness, who, being sworn, testified as follows:

90 I reside in Jersey City, and am attorney of the defendant, I was at Vulcan, Michigan, between the 19th and 24th of July, 1883. I received from Dr. Jones, of Vulcan, a tin can. That is the Dr. Jones who has been mentioned here. It was such a can as vaseline is usually packed in. It was said to contain the duodenum and one or two other portions of intestine taken from the body of Dr. Barry. Before I came away the lid of the can was pressed down tight and wax was melted and placed around the lid, so that none of the liquid could escape from it. It was then tied crosswise in two or three directions with red tape and the knots and jointings of the tape sealed. A card was attached to the can to which Dr. Jones subscribed his name and a statement to the effect that the can contained the sections of the intestine. The can was packed in a small cigar box, tied up in paper by myself. The sealing had been done by Dr. Jones' brother and myself. I took the package with me to New York. It remained in my possession from the time it was handed to me by Dr. Jones until I delivered it to Dr. Carpenter. I delivered it to Dr. Carpenter within a few days. I handed the package, enclosing the can, to Dr. Carpenter, and told him I wanted to know, for the company, the condition of the intestines contained in that box; wanted him to make me a microscopical report of the condition in which he found the intestines enclosed in that can. I did tell him, personally, the intestines, as the card stated, were taken from the body of Dr. Barry at an autopsy. I left the package with Dr. Carpenter, and it was opened by him in my presence and in the presence of Dr. Avery.

Cross-examination:

91 Q. Did you tell him there was a lawsuit pending or going to be about Dr. Barry's death?

A. I didn't have any idea about a lawsuit in the case. It was a month before a lawsuit was thought of.

Thereupon the defendant called Dr. WESLEY M. CARPENTER, who, being duly sworn, testified as follows:

I reside in New York and am a physician and surgeon by profession. I am instructor in the pathological laboratory of New York, secretary of the New York Pathological Society, secretary of the New York County Medical Society, editor of the Quarterly Epitome of American Practice of Medicine and Surgery, curator of the Bellevue Medical Hospital, resident fellow of the New York Academy of Medicine, and fellow of the Royal Society of Physicians. I was graduated at Columbia college in 1863, and hold a diploma, and have been practicing since that time. I have made a special study of pathology. I received a package from Mr. Smith of a small tin can sealed with wax, tied with tape, and containing certain specimens. I took the can, in the presence of Mr. Smith and Dr. Avery, and opened it to inspect what the contents of the can were. I found them to be sections of intestines. I immediately resealed the can and took it to the laboratory. After putting them in process of preparation for microscopical examination I examined them. I cut open the duodenum—there was about seven inches of it, and a piece of the ileum. I made a memorandum at the time. The specimens were in a small tin can, the cover of which was sealed with wax and secured with red tape, to which was attached a card. The knots in the tape were sealed with black sealing wax and the seals were stamped. The card contained the following announcement: "Section of duodenum with colon, taken from
92 the remains of Dr. Barry; post mortem, B. W. Jones, Monday, 4 a. m., July 5." The tape was slipped from the can, the wax around the cover removed, the cover taken off, all in the presence of Mr. Smith and Dr. Avery. I found the can nearly filled with a reddish-brown liquid, which contained two portions of intestine—first, a piece of the duodenum; second, a piece of the ileum, with a piece of the ascending colon adjoining it. The specimens were then replaced in the same fluid and can, the cover again sealed with the wax, and the whole taken to the laboratory of pathology and hystology of the medical department of the University of the City of New York, 410 East 26th street, New York, at once, where I immediately unsealed the can, removed the specimens, and washed them, first with water—that is, allowed a small stream of water to flow over the surface gently to float away the dirt—and then with diluted alcohol. After they had been cleaned in this way I spread them out and noted the following description: The piece of duodenum was seven inches long. To it was attached a portion of the head of the pancreas. The external layer of the intestine was smooth and was very loosely attached to the gut. The mucous membrane had a dirty, red color. Neither the peritoneal coat nor the mucous membrane presented any unhealthy pathological appearances to the naked eye. The caliber of this portion of the

intestine was normal. The other specimen consisted of a portion of the ascending colon, together with a piece of the ileum—that is, small intestine—immediately adjoining. The piece of the colon had been laid open. It measured 9½ inches in length. The external coat was smooth. The mucous membrane had a dirty,
red color. The caliber of the gut was normal. To the
93 naked eye this piece of intestine did not present any abnormal pathological changes. The sæcum (head of the colon) was normal. The vermiform appendix was permeable and did not contain any foreign body. There was no opening in it which communicated with the peritoneal cavity, nor was there any evidence that it had ever been the seat of ulceration or inflammation. The piece of the ileum attached was abnormally narrow and admitted only the little finger of my right hand, over which it fitted as snugly as a close-fitting kid-gloved finger—about ⅝ of an inch in diameter. This portion of the small intestine when normal has an average diameter of about an inch and a half. After this portion of the ileum had been opened and stretched out it measured 6½ inches in length. The external coat was smooth. The walls were rather thinner than normal. The mucous membrane had a dirty, red color, and seemed thinner than normal. No agminated glands (Pyers' patches) were seen. This intestine presented to the naked eye substantially a normal appearance, except with reference to the caliber of the tube. These pieces of intestine were placed in separate glass-stoppered glass jars, immersed in alcohol, labeled "Michigan," and placed in security to await further examination. This examination was made in the usual way. August 5th the alcohol was changed. August 6th the specimens were removed from the jars and portions cut out for microscopic examination. From these pieces I made sections and examined them with the microscope, and did not find any change which indicated that the duodenum had been the seat of an acute inflammation. The colon showed the blood vessels filled with blood. The mu-
cous membrane presented otherwise substantially the same
94 appearance as seen in the duodenum and the ilium. In neither was there any evidence of acute inflammation, either catarrhal, croupus, or phlegmonous. August 7th I repeated the microscopical examinations, making sections from other portions of the intestines. Nothing further was found than has already been given under date of August 6th, 1883. The duodenum, from ocular appearances, was not abnormal. To the naked eye it did appear to be the seat of a disease. I made probably 100 sections of it, and examined a great many through the microscope. I did not find any evidence of acute inflammation. If there had been any inflammation of the duodenum there would have been infiltration of the tissue, the ordinary evidence which is found as a result of inflammatory process. If there had been inflammation it could not have disappeared after death.

Q. As an expert, what would you say as to whether duodenitis could result from a jump of three or four feet by a man of the height and size that has been described here?

A. I do not see exactly how it could. It is simply a matter of personal opinion. I do not think the duodenitis could be caused by simply jumping down three, four, or five feet. I did not find in the duodenum examined by me any constriction or any occlusion or any evidence of there having been any constriction or occlusion in the duodenum. I do not think it could have been possible for it to have escaped my attention, for I slit the piece open the entire length and it was normal as to caliber. The ilium was narrow. I made sections of it and some examination. I suspect the cause of the narrowness of the ilium was of congenital origin. I have treated
95 cases that were said by other physicians to be duodenitis. I never have heard or known of an obstruction to the duodenum caused by a jump or jar. The duodenum is better protected than any other portion of the intestine. I do not think a jump from a platform three or four feet from the ground, where a man landed without falling, could cause an obstruction to the duodenum, nor do I think a wrenching or turning of the body could cause it. I do not think there are any cases on record of duodenitis being caused by a jar, jump, or wrench. I believe there were one or two with reference to localized injury, but, as far as the identical fact of jumping down is concerned, I don't think there are any cases of this kind on record. None of the evidences of the inflammation material to an examination could have escaped in the fluid. Some of the superficial evidences might. I do not know what the cause of Dr. Barry's death was. I do not know from what I have heard. I have stated that I had not found any occlusion in the duodenum.

The piece shown Dr. Hirschmann and Dr. Mason is here exhibited to the witness who states:

This is a piece submitted to me for examination, and was taken from the body of Dr. Barry, as reported by Dr. Jones. The piece presents a normal appearance. The external surface, as I have stated in my report, has been removed. The general thickness and appearance of the intestine does not present anything abnormal to the naked eye. The duodenum was never the seat of inflammation or occlusion sufficient to cause death. There are appearances which lead one to know and distinguish the different portions of the intestines. In the upper part we have the convoluted appearance of the membrane. It is very marked in the upper part, and gradually diminishes until we reach the ilium, where it is only slightly marked.
A pathologist, if he is skilled, can tell very near where this speci-
96 men came from. This is a fair sample of the duodenum. It all looked the same way. Simple duodenitis is simply a catarrhal inflammation of the duodenum and is not uncommon. It is almost always present in cases of jaundice. Aside from that, it is not a common affection. It is so rare that a great many authors deny its existence. Of course, it appears in diseases of other portions of the alimentary canal. I have never known this catarrhal duodenitis to cause death. I have heard all the testimony that has been given in this case. From the symptoms as given by the physicians I do not know what was the matter with Dr. Barry. They did

not show to me what was the matter with Dr. Barry. Gangrene never occurs after death. By pathological condition I mean diseased condition. When I said there were no pathological appearances in this specimen submitted to me I meant there were no diseased conditions. I have had considerable experience in autopsies in the last 12 years. I have superintended or been present at probably two or three thousand. I am steadily engaged in that class of work. It is one of the regular duties of the instructor in the pathological laboratory. Diseased tissue are most commonly placed in alcohol solution, chromic acid, and bichromate of potash to preserve them for microscopic examination. These fluids do not remove from the diseased tissue any portion which is necessary to a complete examination with the microscope. It is not essential to examine microscopically even the fluid or debris at the bottom of the vessel which contains the fluid and specimens in order to be able to reach a correct diagnosis concerning the morbid processes which
97 affect the diseased tissue. The preservative fluid or debris at the bottom of the jar, which contains both the fluid and diseased specimen, do not contain any evidence of disease affecting the tissue that will not be revealed by the tissue itself. The tissue preserved contains the essential evidence of disease. The nature of the morbid process or disease which has affected a piece of tissue cannot be determined by a microscopical examination of either the preservative fluid or the debris at the bottom of the fluid. I never saw a duodenum which was entirely occluded by an acute inflammation of the mucous membrane, nor ever heard of any case but this one. I cannot conceive a case of acute inflammation of the duodenum occluding the gut completely and yet be limited to this portion of the intestine. I do not know of such a case or of ever seeing one. The intestine is made up of three layers. Beginning on the outside is the peritoneal coat, then the muscular layer, and the mucous layer inside. These three are held together by a loose tissue, which we call the connective tissue. The exterior tissue is a serous membrane, which has a smooth, glistening appearance. The mucous membrane might be inflamed without affecting particularly the other tissues, but that could not stop up the passage. If the inflammation had gone through the exterior walls it would appear on microscopical examination and also to the naked eye. It would be impossible for that to disappear after death except by rotting away. The tissue was in sufficiently good condition when examined by me to be able to diagnose the changes that had taken place in it. The autopsy itself was also within sufficient time.

98 Cross-examination:

I have no particular interest in this case. I have been here before. I did not know there was no necessity of my coming. I did my best to get rid of coming. I was paid $250 for coming out last time for the trial, over and above my regular witness fees. I do not know how much I will be paid this time. I did not say that there was no such thing as an occlusion of the duodenum.

Occlusion of the duodenum may occur; may be produced by sufficiently large gall stones. It may be occluded by constriction.

Q. Same as this was?

A. This was not constricted.

Q. How do you know?

A. I saw it. I did not see it as it lay in the body, but I saw the specimen. It takes a good deal to twist an intestine so that the intestinal contents are stopped. I have never heard of children twisting the intestines by skipping rope. In a great many instances we do not know what produces it. I do not think it ever occurred in the duodenum. I have read the work of Frederick Rhodes.

Q. Supposing you were called to a patient who had been perfectly healthy before this, who had jumped a distance downward four or five feet and received a jar, came down solid, was taken sick a few minutes afterwards, showed signs of it in the face, became dizzy driving home, a distance of 5 or 6 miles, and on getting home he should undertake to eat and could not and would vomit everything he did swallow, water or food, and that this should occur on the 20th of the month in summer, this vomiting and retching
99 should continue until death which, occurred, we will say, nine days after, and the patient complained of pain at the seat of the duodenum, and that there was nothing passed through him except a bloody ooze; what would you say was the matter with that man?

Which question was objected to by defendant as not in accordance with the facts.

By the COURT: Instead of stating in the question that he was sick state that he had the appearance of being sick—that is, that he looked pale, and that he had difficulty in driving. I do not know that Dr. Hirschmann used the expression "dizziness," but he said something about its being difficult for him to drive the horse. You may answer the question as thus framed.

To which ruling the defendant excepted.

A. I am unable to say. I would not make a diagnosis on these facts. If I were called in as a witness under those circumstances I could not tell what the matter was with him. I would not make a diagnosis on those data nor make a further examination.

Q. Supposing after the person had died and had been buried you should make an examination in which you should cut him open and examine the duodenum, and should find that from a certain portion of the duodenum downward it was engorged with blood; we will say from that portion up to the stomach was apparently in its normal condition, and at that point you found the sides appeared to adhere together. You should cut off this part last mentioned and you could see no opening in the duodenum. What, then, would you say the person died with?

A. I would not be able to say thus far. An obstruction
100 of the duodenum would cause death if it should continue a sufficient length of time; the number of days would depend

upon the condition of the patient. I received the can with its contents; it contained pieces of intestine and also preservative fluid, which was of a brownish color. I think the preservative fluid would have been better if it had been all alcohol. I diluted the alcohol to make the process gradual and because alcohol is costly. I heard Dr. Hirschmann's testimony yesterday. I think the brownish color of the liquid came from the decomposition of the tissues. I threw away the brownish liquid. I received the can early in August—August 4th, 1883, 4:30 p. m. I took the intestines out and put them in glass jars. I washed them with water and alcohol. The alcohol was changed August 5th and August 6th. I then cut my specimens to pieces for microscopical examination. When I cut them off I examined them. I made an examination again on August 6th, on which day I repeated the microscopical examination. I found no traces of inflammation. Dr. Hirschmann testified that the occlusion of the duodenum was caused by inflammation. If that were the case there would be evidences of inflammation in the rest of the duodenum. I do not concede that the inflammation could be so localized. It might extend through the entire gut, and might be from four inches to a foot. I examined the whole of the intestine sent me. I cut out a sufficient number of parts to enable me to reach a conclusion. No part was so decomposed as to prevent an examination. If a part was entirely decomposed it would show no signs of inflammation, but the decomposition must have gone on so as
101 to have entirely destroyed the tissue. I found the specimen uniform in color. I am unable to say, from the symptoms testified to, what that man died from. One of the things to be investigated would have been some obstruction of the bowels at some point. I am unable, however, to make a diagnosis from the testimony I have heard, and refuse to make a diagnosis. If the obstruction had been caused by gall-stones or tumors, the patient would not necessarily have died any sooner. A patient might die in 24 hours from gall-stones. I do not think the contents of a bowel, if lying in contact with the inner surface of the bowel, has any great effect in abstracting and absorbing traces of inflammation from the bowel. It would have to remain there until decomposition took place in order to obliterate the anatomical trace—I mean the outline of the cells that go to make up the different layers. It is not necessary, to get a correct microscopical result, that it should be examined immediately after death. The contents of the bowel, if left in contact with the surface, do not absorb the traces of inflammation. The fact of a man being treated with opium to relieve pain would have no effect on the inflammation; its purpose is to allay pain by preventing pain. The effect of opium is to prevent the surfaces from rubbing together, to hold everything quiet. In the intestines there is always what is called vermicular motion, which opium, when administered in large quantities, largely prevents. The cause of inflammation is a question. I can explain some of the theories if you care to take the time. I have not been giving my theory at all. There is ground of evidence to sustain the theory that inflammation at this very region is due to a disturbance of the nervous system, and that

102 disturbance may be brought about by a variety of causes. The disturbance of the nervous system affects primarily, so far as we can discover with the microscope, the blood vessels in such a way that the circulation is retarded. Certain elements of the circulation then find their way outside the vessels into the tissue itself and there they remain, becoming part and parcel of the inflammatory process. Then there are two or three ways in which the inflammatory process may be terminated—in abscess, in adhesion, in simple secretion or increased secretion; if it is a mucous membrane, increased secretion of mucus. Those are the ordinary phenomena as we observe them.

103 (Reads from book:) It is necessary to examine an intestine immediately after death, as it rapidly undergoes destructive changes after death if left in contact with the intestinal contents.

A. All right. The book that Mr. Bice refers to is the examination of tissues for healthy appearances & has nothing to do with the examination of tissues that have been diseased.

Q. If an intestine were brought with its opposite walls closely in contact and inflamed there would be an adhesion, would there not?

A. There have been some cases. Croups, some call it; "diphtheretic," some call it.

I found granular appearances in the epithelial cells; don't know if it was brought about by inflammation. It is one of the mooted points.

If the intestine were adherent it would not be necessary to examine it with a microscope; you could see it.

Redirect examination:

There was no evidence that the specimen of duodenum examined by me had ever been adherent. I took the pieces examined from various places. The symptoms of nausea and vomiting are the commonest symptoms and common to a great many different diseases. The small intestines are called the duodenum, jejunum, and ileum.

Q. Assuming the facts as stated by Drs. Hirschmann and Jones as to the symptoms, and take that with your own knowledge of the case and your examination of these tissues, did the jar or jump cause a constriction or occlusion of the duodenum, resulting in Dr. Barry's death?

A. Taking my knowledge of the case, I should say it did not. I found no evidence of it.

Recross-examination:

Some of these symptoms point to other diseases. All of them might be present in acute myelitis of the liver. All of them
104 in dysentery; all of them in certain forms of typhus fever. I have seen cases of typhoid fever where there was almost incessant vomiting and nothing passed the bowels. They might be present in jaundice. The pain in the locality pointed out might

indicate gall stones. There was no gall stone in the part examined by me, bnt there might have been a gall stone in the cystic duct.

Q. That could not account for the closing up of the duodenum?

A. The duodenum was not closed.

Thereupon the defendant read the deposition of FRANCIS DELAFIELD, as follows:

I am a physician and reside in New York city. I was graduated at the College of Physicians and Surgeons, medical department of Columbia College, New York city, in 1862, and have been engaged in the practice of my profession ever since. I am professor of pathology and practice of medicine in the College of Physicians and Surgeons, New York city; pathologist and visiting physician at Bellevue and Roosevelt Hospital, New York city. I am a member of the County Medical Society of New York, fellow of the Academy of Medicine, a member of the New York Pathological Society, and corresponding member of the Philadelphia Pathological Society. I have made a special study and devoted my time specially since 1862 to pathology and hystology, both gross and microscopic. I am regularly engaged in pathological and microscopical work, practicing, and in teaching as professor of pathology. I make about 100 autopsies a year, and have not made less in any year since 1866.

Alcohol and chromic acid are the fluids into which diseased
105 tissues are placed preparatory to microscopical examination.

These preservative fluids do not remove from the diseased tissue any portion which is essential to a complete examination with the microscope, so that when the tissue is examined a correct diagnosis cannot be made. It is not essential to examine microscopically either the fluid or the debris at the bottom of the vessel which contains the fluid and the specimen in order to be able to reach a correct diagnosis concerning the morbid process which has affected the diseased tissue. The preservative fluid and the debris at the bottom of the vessel, which holds both the fluid and the diseased specimen, might contain evidence of the nature of the morbid process affecting the tissue, but nothing essential to a correct diagnosis. The tissue preserved contains the essential evidence of disease. The nature of the morbid process which has affected a piece of tissue cannot be determined by microscopical examination of either the preservative fluid or the debris at the bottom of the vessel. I never saw a duodenum which was entirely occluded by inflammation of its mucous membrane. Acute inflammation of the mucous membrane of the duodenum cannot occlude the duct completely, and yet be limited to this portion of the intestine. I do not believe such a case ever occurred. I know of no such case on record. Granting that the gut can be so occluded by acute inflammation affecting only the mucous membrane, the intestine would not present a normal appearance at an autopsy made at the end of four or five days after the death. I am not connected professionally or otherwise with either party to this action, and have no interest in the result thereof.

Thereupon the defendant read the deposition of EDWARD
106 G. JANEWAY, who testified as follows:

I am a physician, and graduated at the College of Physicians and Surgeons, medical department, Columbia College, New York city, in 1864. I have been engaged in the practice of my profession ever since. I am pathologist at Bellevue Hospital; professor of pathological anatomy and of clinical medicine, and also associate professor of principles of medicine in Bellevue Hospital Medical College, New York city. I have been connected with the college in a professional capacity since 1873; am also a member of the New York County Medical Society, fellow of the Academy of Medicine, and the New York Pathological Society. I have made a special study and devoted my time specially since 1864 to pathology and hystology, both gross and microscopical. In my professional experience I have made a great many autopsies—in all as many as four or five thousand—and am regularly engaged in microscopical work practically and in instructing others. Diseased tissues are most commonly placed, preparatory to microscopical examination, in alcohol, solution of bichromate of potash, and solution of chromic acid. The preservative fluids do not remove from the diseased tissue any portion which is essential to a complete examination with the microscope, so that when the tissue is examined a correct diagnosis cannot be made. It is not essential to examine microscopically either the fluid or the debris at the bottom of the vessel which contains the fluid and specimen in order to be able to reach a correct diagnosis containing the morbid process which has affected the diseased tissue. Neither
the preservative fluid nor the debris at the bottom of the ves-
107 sel contain any evidence of the nature of the morbid process affecting the tissue that will not be revealed by the examination of the tissue itself. The tissue preserved contains the essential evidence of the disease. The nature of the morbid process which has affected a piece of tissue cannot be determined by a microscopical examination of either the preservative fluid or the debris at the bottom of the vessel. I never saw a duodenum which was entirely occluded by acute inflammation of the mucous membrane. I never saw or heard of a case of acute inflammation of the mucous membrane which occluded the intestine. I should doubt whether such a case ever occurred. I do not know of such a case on record.

Q. Granting that the gut can be so occluded by acute inflammation affecting only the mucous membrane, would the intestine present a normal appearance at an autopsy made at the end of four or five days after death?

A. No, sir. The epithelium of the mucous membrance would be very apt to be found in the preservative fluid, but such epithelium with a post-mortem examination made four or five days after death would have no diagnostic value in microscopical examination. Moreover, such epithelium would not have produced obstruction of the intestine. I am not connected, professionally nor otherwise, with either party to this action, and have no interest in the result thereof.

108 Thereupon the defendant read the deposition of EDWIN F. WARD, which is as follows:

I reside at 33 W. 36th street, New York city, and am a practicing physician; have been such about 23 years. I was graduated from the College of Physicians and Surgeons, at New York city, in 1861. I have been engaged during that period in surgical practice, but not to the exclusion of medical practice. I was surgeon in the army about three years during the war of the rebellion. I have never read in medical or surgical works or ever heard of the obstruction or occlusion of the duodenum caused by a jump or a jar. In my opinion a jump to the ground from a platform three or four feet in height, where the man jumped and landed on his feet without falling, would not cause an obstruction or occlusion of the duodenum, nor would a turning or wrenching of the body in jumping cause an obstruction or occlusion of the duodenum. I never have heard nor know of any case on record in medical or surgical works where a jump or jar or wrenching of the body in this manner was followed by an inflammation of the duodenum or by occlusion or stricture of the duodenum. I am somewhat familiar with the preparation and preservation of pathological specimens. The immersion of specimens of intestines in alcohol for a month or six weeks would not remove the essential evidences of morbid processes if any existed. I have heard the testimony of Dr. Carpenter. I do not believe it possible that any essential evidence of inflammatory process could have been removed from the surface of the duodenum which he swore he examined and be left floating in the fluid
109 in which specimens were immersed when he received them, because essential evidence of inflammation or other pathological process would remain in the tissue itself. The fluid in which the specimens were immersed could not contain any essential evidence of inflammation while the tissue of the duodenum itself would show no evidence of inflammation.

Thereupon the defendant called Dr. SOLON MARKS as a witness, who, being duly sworn, testified as follows:

I am a physician and surgeon, and reside in Milwaukee; was graduated in 1853 at Rush Medical College. Alcohol, bichromate of potassium, and some other fluids with which I am not familiar are fluids into which diseased tissue are usually put. The preservative fluids do not remove from the diseased tissue any portion necessary to a complete examination by the microscope. It is not essential to examine the fluids in which the specimens are preserved; the tissue contains the evidence of disease. I never knew of a case of duodenitis or constriction or occlusion of the duodenum caused by a jump. I don't remember of ever examining a duodenum which was occluded or inflamed on the inner mucous membrane. I cannot conceive such a case, nor have I ever heard of one in actual practice. The different portions of the intestine present certain marked peculiarities on the entire surface, so that a skillful physician can tell from what portion a certain specimen may be taken.

Q. Granting that this duodenum could have been occluded, and that the man died from the effects of occlusion or stricture of
110 the duodenum, would that condition disappear after death?

A, No, sir; very nearly the same appearance would remain after death as before. An appearance from an occlusion which caused death could be seen microscopically. It would not become normal and healthy after death.

Cross-examination:

I never heard of a case of occlusion of the duodenum in my practice. There might have been such cases, but which were not discovered, as there was no post-mortem examination.

Q. Suppose you were called to visit a patient whose history was this: He was a person of perfectly healthy constitution physically, of age about 34 years. He jumped down a distance of 4 or 5 feet on the 20th day of June, and he received a jar, coming down solidly on his heels. Supposing that person should exhibit signs of paleness in the face, so much so as to attract the attention of the person with him, who is a doctor, and driving home some thirty or forty minutes after that, some eight or nine miles, undertook to drive, and could not drive properly, and was seemingly dizzy, and partially closed his eyes; suppose after he got home he sat down to eat and was unable to retain anything, either food or water, and then got up and lay down, and continued that appearance and that vomiting and that wrenching for eight or nine days before death, resulting in death; suppose during this time the person never passes anything through him—any fœcal matter of any account—and was almost constantly vomiting and wrenching, showed very great depression in his appearance and countenance, and he pointed, when asked to locate the pain, in the region or on that por-
111 tion of the body immediately over the duodenum; suppose nothing had passed through him, as I say, except a bloody ooze, decomposed mucus, on up to the day of his death, and which we will say occurred on the 29th of the same month, nine days after, in warm weather, what would you say was the matter with the man?

Which question was objected to by the defendant as irrelevant, incompetent, and immaterial and because not a truthful statement of the testimony.

By the COURT: Omit from the statement that he showed signs of dizziness.

Which objection was overruled, and defendant excepted.

A. Those being facts, I should conclude that he had received some injury in the jump, either to the liver or stomach or upper portion of the intestine, granting that those symptoms are all correct.

Q. Supposing the person died on the 29th, was buried on the 1st of July, and that on the 5th of July should be taken up from the grave and a section of the duodenum taken out and examined by a

physician, and that a portion of the duodenum showed that the mucous surfaces had been adhered together so that in rubbing them between the fingers they would not slip one upon the other as the other portions of the intestine would; supposing you should cut off a section of the duodenum at this point where the surfaces failed to slip one upon another and it had the appearance of being closed to the naked eye; taking the question in connection with the other, what would you say was the cause of the man's death?

112 A. I could not come to any conclusion from that examination; rubbing and looking might have deception about it. I think it would be necessary to introduce a probe. It would not satisfy me by any means—that sort of an examination—whether there was any positive adhesion. It might have been closed and yet be no actual adhesion or occlusion. I could not tell from that examination whether there would be an occlusion—a closing up of the passage—that would account for the manifestations and symptoms that he manifested during his examination. If you introduce your finger through, that would decide the question. If there was an occlusion it might have been difficult for the contents to pass through and yet be no adhesion. For the purpose of finding adhesion I should introduce a probe. I should think it necessary to introduce an instrument, and to see how much force it took to open it; and that examination you describe to me is not sufficient to come to any conclusion. If four physicians all examined in the same way and all came to the same conclusion that conclusion would not satisfy me.

Thereupon the defendant called Dr. WILLIAM FOX as a witness, who, being duly sworn, testified as follows:

I am a physician and surgeon practicing in Milwaukee, and have been in constant practice 16 years. The duodenum is well protected against injury and would not be apt to be injured by a jump or a jar coming from a jump, less likely, indeed, than any other part of the intestines. I never knew of a case of occlusion or constriction of the duodenum resulting from a jump or a jar, nor did I ever hear of such a case. I cannot conceive of a case occurring

113 from a jump or a jar in that part of the intestines. In case there had been constriction or occlusion of the duodenum resulting in death the evidence of it would not disappear after death, and would be apparent to a microscopic examination. The different portions of the intestines can be told from one another by their anatomical construction.

Cross-examination:

The duodenum is held in its position by tissues, and parts of it are covered by the peritoneum. The duodenum is protected by other tissues. The liver in front of it, the pancreas, and ducts hold it in place. The other intestines are also held by the pancreas, and the duodenum is supported by the pancreas.

Q. From what you knew of Dr. Barry's health, supposing he should jump downwards a distance of four or five feet on the 28th

day of June and come down solidly on his heels, receiving a severe jar, so much so as to attract the attention of others with him——

By the COURT: Solidly upon his feet. I do not know whether the testimony was that he came down upon his heels.

Q. So much so that it would attract the attention of others who were with him, and occasion a remark about it; supposing directly after that he would show a paleness in his face, and indicate something the matter with him; supposing he had to drive home, a distance of 8 or 9 miles, and in so doing he was unable to keep the track, and would occasionally close his eyes in a sort of dreamy way——

By the COURT: Occasionally close his eyes. State the testimony as it was.

Q. That after he came home he should undertake to eat
114 and could not drink water and would throw it up immediately—vomit—get up from the table to lie down on the bed, and that his vomiting would be continued at short intervals, of course, between that and the day of his death, which would be the 29th day of June following; nothing would pass through him, and he was unable to retain anything on his stomach or even introduced by way of the rectum; supposing nothing passed through him except a bloody ooze and he would vomit up everything he would swallow constantly and he would complain of pain in the region of the duodenum, what would you say was the matter with him?

Which question was objected to by the defendant.

A. I couldn't tell from that history without an examination, because those symptoms are common to many things. It would suggest to me a hernia.

Q. Suppose there were Dr. Hirschman and Dr. Mason and Dr. Jones and they should on investigation conclude that the man had duodenities, would that affect your judgment?

Which question was objected to; objection overruled; defendant excepted.

A. It would in this way, leaving out that part of the question where you want me to consider the jump.

Q. I am asking the jump, because it immediately preceded the sickness.

A. You are giving me a history of the jump; bearing that in mind, I would have suspected a hernia, if I gave any thought
115 to cause and effect. I would find hernia in place where herhia occurs. By hernia I mean rupture. If there was any rupture I would discover that outside the body. Duodenitis might have all those symptoms. I would have to discover the cause of the disease before I could locate the disease. All those things would come up for consideration with those symptoms, as to hernia, enlargement of the bowels, obstruction of the bowels, &c. It would be a pretty sure demonstration that there was an obstruction of the bowels if nothing would pass through them.

Redirect examination:

That would be all done away with if fæcal matter passed through him.

Q. Supposing that there was found no obstruction in the autopsy, from the duodenum to the end of the canal, the anus, and that upon a microscopical examination no disease was found in the duodenum, would you say there was any obstruction?

A. No.

Recross-examination:

Q. Suppose after death four physicians should examine him and remove the entire duodenum, and should find in cutting it that one portion of it was apparently adhered—that is, the mucous surface had become adhered, so that they would not rub between the fingers like the other portions immediately in contact with it?

A. That would not be an examination of that part of the intestine. It is a thick tissue and you can't tell anything about it by rubbing on the outside of it. Even if the other portions did yield
116 that would not be an examination at all. I could not tell whether it was previous or without running something through it. I wouldn't care if there were forty physicians there it wouldn't affect my judgment.

Thereupon the defendant rested its case, and the above and foregoing is all the testimony produced and offered by the defendant upon the trial of said cause.

The plaintiff then recalled Dr. Darius Mason in rebuttal, who testified as follows:

I have had some experience with the microscope and have practiced with it more or less for thirty years, and have examined tissues and pathological specimens. I should consider it important to examine the preservative fluid if I were trying to ascertain whether there was an acute inflammation. A brownish liquid and the debris necessarily contained in it is the product of inflammation. If the contents of the bowel lay in contact with the inner surface the evidences of inflammation would be somewhat dissipated. Decomposition destroys tissue. It would not be useless to submit tissue to a microscopic examination to ascertain whether there had been inflammation there unless it was completely decomposed. Decomposition commences first wherever there is inflammation.

Q. Doctor, is it absolutely necessary in order to ascertain whether the mucous membranes are adhered, to insert a probe in the duodenum?

A. I do not know that it would be absolutely necessary; might use your finger. It seems to me you might use your eyes without using a probe.

Cross-examination:

I should think if there was inflammation in any portion
117 of the intestine at the time of death, and before decomposition, it would still be there, and you could see it with the microscope. Sometimes, however, appearances of acute inflammation disappear very rapidly after death. I do not think inflammation which causes death, and was present at the time of death, would entirely disappear.

Thereupon the plaintiff recalled Doctor HIRSCHMAN:

Q. Doctor, what effect would it have, in your opinion, on the microscopical examination of an intestine to ascertain whether there was inflammation to throw away the brownish liquid that was found in the intestine?

Which question was objected to by the defendant as not rebuttal, and, secondly, because he has testified that he is not a microscopical expert and does not use the microscope; which objections were overruled, and the defendant excepted.

A. If such a liquor were poured out I should not think I were making a thorough microscopical examination. I should think some evidence of inflammation would disappear by the intervention of long time and by the intestinal contents being in contact with the inner surface of an intestine for four or five days. It was not necessary to introduce a probe into the adhered portion of the duodenum to ascertain whether it had been adhered or not. It was a clear case. I should not have done so for fear of destroying the condition of things. My idea was to leave it just as I found it. The adhesion was apparent to the eye.

118 Cross-examination:

I do not prepare specimens for microscopical examination, and do not know how to do it.

Thereupon the plaintiff rested, and the above and foregoing is all the evidence offered or received by either of the parties to the above cause.

Thereupon the defendant, by its counsel, renewed its motion that the court direct the jury to return a verdict for the defendant, on the ground that there is no evidence to sustain a cause of action against the defendant; which motion was denied by the court, and defendant accepted.

Thereupon the plaintiff, by permission of the court, amended her complaint as follows: By alleging that at the time of Doctor Barry's death, and from that time, and for the balance of the year 1883 and including the time as provided for in the policy in which the said insurance was to be paid to the plaintiff herein, there were insured by it in class AA, the same class in which said Doctor Barry was at the time insured, 4,806 members or persons upon whom the defendant could have levied an assessment under its by-laws and rules

of the two dollars per head, and making an amount exceeding the plaintiff's claim (of $5,000).

Which amendment was objected to by the defendant.

By the COURT: The rule of the State court in that respect prevails here. The complaint may be amended so as to conform with the proof.

Thereupon the defendant, by its counsel, demanded that the court submit a special verdict in this case, as provided by the rules in practice in the State of Wisconsin, and, as a question upon such special verdict, requested the court to submit the following
119 question: "Whether the death of Doctor Barry was caused by duodenitis;" which demand was denied, and the defendant excepted.

Thereupon the defendant, by its counsel, asked the court to submit, in connection with the general verdict, the special question of whether the assured died of duodenitis; which request was denied, and defendant excepted.

Thereupon the defendant, by its counsel, requested the court to charge the jury as follows:

First. It appears from the evidence in this case that by the policy in suit the defendant company accepted John S. Barry as a member of class AA, and in effect agreed to levy an assessment of two dollars upon each member of said class, and to pay the same to the plaintiff if said John S. Barry should die of bodily injuries, effected through external, violent, and accidental means, but in no event to pay more than $5,000. Before the plaintiff can recover in this case she must show that the defendant, when it received the proof of death, on or about July 15th, 1883, either had cash on hand belonging to class AA or levied an assessment upon the members, and by that means the defendant received money which belonged to class AA. By the evidence in suit it appears that there were over 4,000 members belonging to class AA during the months of June and July, 1883, who were subject to assessment of two dollars per man, and that on June 1st, 1883, an assessment was made upon members belonging to class AA, and that on June 29th, 1883, the defendant had on hand $2,060.15 belonging to class AA, and that an assessment was then pending and in process of collection. This evidence does not show any cash on hand belonging to class AA on
120 July 15th or at any later date, nor is there any other evidence in the case which would show that fact or that any assessment was levied; therefore the plaintiff cannot recover in this action, and you are instructed to return a verdict for the defendant.

Which instruction the court refused to give, and the defendant excepted.

Second. That the jury find for the defendant.

Which instruction the court refused to give, and the defendant excepted.

Third. That no cause of action is stated in the complaint, and you must therefore find for the defendant.

Which instruction the court refused to give, and the defendant excepted.

Fourth. That no accident within the true intent and meaning of the policy occurred to Doctor Barry. Therefore you must return a verdict for the defendant.

Which instruction the court refused to give, and the defendant excepted.

Fifth. That if you find that the alleged injury was not sustained by Doctor Barry, then your verdict must be for the defendant.

Which instruction the court refused to give, except as contained in the general charge, and the defendant excepted.

Sixth. That if you find the injury was not effected through violent means your verdict must be for the defendant.

Which instruction the court refused to give, except as contained in the general charge, and the defendant excepted.

Seventh. That if you find the injury was not effected through accidental means your verdict must be for the defendant.

Which instruction the court refused to give, except as con-
121 tained in the general charge, and the defendant excepted.

Eighth. That if you find the injury was not effected through external means your verdict must be for the defendant.

Which instruction the court refused to give, except as contained in the general charge, and the defendant excepted.

Ninth. If you find that death occurred directly or indirectly in consequence of disease or bodily infirmity your verdict must be for the defendant.

Which instruction the court refused to give, except as contained in the general charge, and the defendant excepted.

Tenth. If you find that death occurred partly or wholly from disease your verdict must be for the defendant.

Which instruction the court refused to give, except as contained in the general charge, and the defendant excepted.

Eleventh. If you find that Doctor Barry did not die from duodenitis then your verdict must be for the defendant.

Which instruction the court refused to give, except as contained in the general charge, and the defendant excepted.

Twelfth. You are instructed that Doctor John S. Barry did not die from duodenitis.

Which instruction the court refused to give, and the defendant excepted.

Thirteenth. If you find that Doctor Barry in jumping alighted squarely on his feet, without falling, your verdict must be for the defendant.

Which instruction the court refused to give, and defendant excepted.

Fourteenth. If you find that the alleged jump did not result in the obstruction or occlusion of the duodenum then your verdict must be for the defendant.

122 Which instruction the court refused to give, and the defendant excepted.

Fifteenth. You are not at liberty to speculate as to what occurred in this jump, but you must be governed by the evidence of witnesses on the trial.

Which instruction the court refused to give, except as contained in the general charge, and the defendant excepted.

Sixteenth. There is no evidence of any wrenching, twisting, or straining of the body in said jumping.

Which instruction the court refused to give, and defendant excepted.

Seventeenth. Considering the character of the injury alleged in this case and the difficulty attending its proper investigation, great weight should be given by the jury to the opinion of scientific witnesses accustomed to investigate the causes and effects of injury to the alimentary canal, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes and who are acquainted with the most recent discoveries in science and the most perfect methods of treatment and investigation.

Which instruction the court refused to give, and defendant excepted.

123 Thereupon the judge charged the jury as follows, to wit:

GENTLEMEN OF THE JURY: On the 23rd day of June, 1882, the defendant association issued to John S. Barry, then residing at Vulcan, Michigan, but since deceased, what may be termed a certificate or contract of insurance, by which it was provided as follows:

"This certificate witnesseth: That the United States Mutual Accident Association, in consideration of the warranties and agreements made to them in the application for membership and of the sum of four dollars, do hereby accept John S. Barry, by occupation, profession, or employment a physician, residing in Vulcan, State of Michigan, as a member in division AA of said association, subject to all the requirements and entitled to all the benefits thereof.

"The principal sum represented by the payment of two dollars by each member in division AA of the association as provided in the by-laws (which sum, however, is not to exceed five thousand dollars) to be paid to Theresa A. Barry (his wife), if surviving (in the event of the prior death of said beneficiaries or any of them said sum shall be paid as provided in the by-laws), within sixty days after sufficient proof that said member, at any time within the continuance of membership, shall have sustained bodily injuries effected through external, violent, and accidental means within the intent and meaning of the by-laws of said association and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof."

124 This is a suit brought by the beneficiary named in the certificate to recover the amount of the insurance.

It is alleged that the deceased sustained an injury within the meaning of the certificate on the 20th day of June, 1883, and it is proved that he died on the 29th day of that month.

There is no question, therefore, that if he was injured as claimed he died within the time after the alleged injury named in the policy; nor is there any question that the policy was in force at the time of his death.

By the terms of the certificate it was provided, as already stated, that to entitle the beneficiary to the sum of five thousand dollars the death should be occasioned by bodily injuries alone effected through external, violent, and accidental means; also that the benefits of the insurance should not extend to any injury of which there was no external and visible sign, nor to any injury happening, directly or indirectly, in consequence of disease, nor to any death or disability caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the certificate, nor to any case except where the injury was the proximate or sole cause of the disability or death.

The issue between the parties may be briefly stated: It is claimed by the plaintiff that on the occasion mentioned by Dr. Hirschmann, when the deceased was at Iron Mountain, he sustained an injury by jumping from a platform to the ground; that this injury was effected by such means as are mentioned in the certificate; that

125 the deceased, at the time of the alleged accident, was in sound physical condition and in robust health, and that the alleged injury was the proximate and sole cause of death.

The defendant, on the other hand, denies that the deceased sustained any injury that was effected through accidental means, and also contends that if any injury was sustained it was one of which there was no external or visible sign within the meaning of the policy, and that the supposed injury was not the cause of the death of the deceased, but that he died from natural causes. The case, therefore, resolves itself into three points of inquiry:

First. Did Dr. Barry sustain internal injury by his jump, from the platform on the occasion testified to by Dr. Hirschmann?

Second. If he did sustain injury as alleged, was it effected through

external, violent, and accidental means within the sense and meaning of this certificate, and was it an injury of which there was an external and visible sign?

Third. If he was injured as claimed, was that injury the proximate cause of his death?

To entitle the plaintiff to a verdict, each and all of these questions must be answered by you in the affirmative, and if, under the testimony, either one of them must be negatively answered, then your verdict must be for the defendant.

The first question (viz., Was the deceased, Dr. Barry, injured by jumping from the platform?) is so entirely a question of fact, to be determined upon the testimony, that the court must submit it without discussion to your determination. In passing upon the
126 question you will consider all the circumstances of the occurrence as laid before you in the testimony; the apparent previous physical condition of Dr. Barry; the subsequent occurrences and circumstances tending to show the change in his condition; the relation in time which the first developments of any trouble bore to the time when he jumped from the platform; the nature of his last sickness and the symptoms disclosed in its progress and termination.

Thereupon the said defendant excepted to the following portion of said charge, as follows: The first question (viz., Was the deceased, Dr. Barry, injured by jumping from the platform?) is so entirely a fact to be determined upon the testimony that the court must submit it without discussion to your determination. In passing upon the question you will consider all the circumstances of the occurrence as laid before you in the testimony; the apparent previous physical condition of Dr. Barry; the subsequent occurrences and circumstances tending to show the change in his condition; the relation in time which the first developments of any trouble bore to the time when he jumped from the platform; the nature of his last sickness and the symptoms disclosed in its progress and termination.

Further, you will enquire what evidence, if any, did the post-mortem examination and any and all subsequent examinations of the parts alleged to have been the seat of the supposed injury furnish of an actual physical injury; what connection, if any, does there or does there not appear to be between the act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of the post-mortem investigations. The question is before you in the light of all proven facts for determination; the court cannot indicate any opinion upon it without invading your exclusive province; and by your ascertainment of the facts the parties must be bound.

127 Thereupon the said defendant excepted to the following portion of said charge, as follows: What connection, if any, does there or does there not appear to be between the act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it

to be, of the post-mortem investigations? The question is before you in the light of all proven facts for determination. The court cannot indicate any opinion upon it without invading your exclusive province, and by your ascertainment of the facts the parties must be bound.

There is presented in the case a train of circumstances. Do they or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus you may properly pursue the enquiry, guided by and keeping within the limits of the testimony.

Thereupon the said defendant excepted to the following portion of said charge, as follows: There is presented in the case a train of circumstances. Do they or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus you may properly pursue the enquiry, guided by and keeping within the limits of the testimony.

If you find that injury was sustained, then the next question is, Was it effected through external, violent, and accidental means? This is a pivotal point in the case, and therefore vitally important. The means must have been external, violent, and accidental. Did an accident occur in the means through which the alleged bodily injury was effected?

The jumping off the platform was the means by which the injury, if any was sustained, was caused.

Thereupon the said defendant excepted to the following portion of said charge, as follows: The jumping off the platform was the means by which the injury, if any was sustained, was caused.

Now, was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping from the time the deceased left the platform until he alighted on the ground?

128

Thereupon the said defendant excepted to the following portion of said charge as follows: Now, was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground?

The term accidental is here used in its ordinary, popular sense, and in that sense it means "happening by chance; unexpectedly taking place; not according to the usual course of things," or not as expected.

Thereupon the said defendant excepted to the following portion of said charge as follows: The term accidental is here used in its ordinary, popular sense, and in that sense it means "happening by chance; unexpectedly taking place; not according to the usual course of things," or not as expected.

In other words, if a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means.

Thereupon the said defendant excepted to the following portion of said charge as follows: In other words, if a result is such as follows from ordinary means voluntarily employed in a not unusual

or unexpected way, then, I suppose, it cannot be called a result effected by accidental means.

But if in the act which precedes the injury something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted from the accident or through accidental means.

Thereupon the said defendant excepted to the following portion of said charge as follows: But if in the act which precedes the injury something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted from the accident or through accidental means.

We understand from the testimony without question that
129 the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice and not from any perilous necessity. He encountered no obstacle in jumping and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement or in the act of alighting on the ground? These are points directly pertinent to the question in hand.

Thereupon the said defendant excepted to the following portion of said charge, as follows:

We understand from the testimony without question that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping and he alighted on the ground in an erect posture. So far we proceed without difficulty. But you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected or did they not? Did he or not miscalculate the distance and was there or not any involuntary turning of the body in the downward movement or in the act of alighting on the ground? These are points directly pertinent to the question in hand.

130 And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred

changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if in jumping or alighting on the ground there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.

Thereupon the said defendant excepted to the following portion of said charge, as follows: But if in jumping or alighting on the ground there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.

Of course it is be presumed that he expected to reach the ground safely and without injury. Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by
131 chance or not as expected, happen in the act of jumping or striking the ground which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means.

Thereupon the said defendant excepted to the following portion of said charge as follows: Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance or not as expected, happen in the act of jumping or striking the ground which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means.

You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in Dr. Barry a mortal injury. Taking it all into consideration and applying to the facts the instruction of the court, you will determine whether, if any injury was sustained, it was effected through external, violent, and accidental means. The defendant claims that if Dr. Barry did sustain injury it was one of which there was no external and visible sign within the meaning of the certificate of insurance, and therefore that the plaintiff is not entitled to recover. Counsel are understood to contend that no recovery could be had under a certificate of in-

surance in the form and terms of this one, if the injury was wholly internal. In that view the court cannot concur. It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare and instrument for the destruc-
132 tion of valuable rights. Visible signs of injury within the meaning of this certificate are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye in the struggle of nature any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury, and with this understanding of the meaning of the certificate of insurance and upon the evidence you will say whether, if Dr. Barry was injured as claimed, there were or were not external and visible signs of the injury, and the determination of this point will involve the consideration of the question whether what are claimed here to have been external and visible signs were, in fact, produced by—were the result of—the injury, if any was sustained.

Thereupon the said defendant excepted to the following portion of said charge as follows: Counsel are understood to contend that no recovery could be had under a certificate of insurance in the form and terms of this one if the injury was wholly internal. In that view the court cannot concur. It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external; that is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury within the meaning of this certificate are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching or bloody
133 or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye in the struggle of nature any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury, and with this understanding of the meaning of the certificate of insurance and upon the evidence you will say whether, if Dr. Barry was

injured as claimed, there were or were not external and visible signs of the injury, and the determination of this point will involve the consideration of the question whether what are claimed here to have been external and visible signs were, in fact, produced by—were the result of—the injury, if any was sustained.

The next question is, If Dr. Barry was injured as claimed, was the injury the sole or proximate cause of his death? Interpreting and enforcing the certificate of insurance according to its letter and spirit, it must be held that if any other cause than the alleged injury produced death there can be no recovery, in that to entitle the plaintiff to recover you must be satisfied that the alleged injury was the proximate cause of death. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. An efficient, adequate cause being found,— must be deemed the true cause unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results follow the injury as its necessary consequence and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened
134 upon the injury, if there was an injury—I mean a disease or derangement of the parts not necessarily produced by the injury—or if the alleged injury merely brought into activity a then existing, but dormant, disorder or disease and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death.

It is claimed by the plaintiff that the supposed jar or shock said to have been produced by jumping from the platform caused some displacement in the duodenum; that it became occluded, to use the expression that has been used by witnesses; that there was constriction and occlusion of that intestine which was accompanied with consequent inflammation—in short, that the deceased had duodenitis as the direct result of the alleged original injury, and in consequence died. This contention is urged upon all the circumstances of the case and upon the testimony offered by the plaintiff tending to show the symptoms which accompanied the last sickness, the diagnosis of the case made by attending physicians, and the alleged developments of the autopsy. It is contended in behalf of the defendant that there was no constriction, occlusion, or inflammation of the duodenum; that the deceased did not have duodenitis, and that no physical injury is shown to have resulted from jumping from the platform. This claim is based upon the contention that the various symptoms manifested in the last sickness of the deceased were consistent with natural causes, with some undiscovered organic trouble not occasioned by violence or sudden injury; that the conclusions of

135 the physicians who made the post-mortem examination were erroneous, and that the microscopic examination of the parts in New York demonstrated such alleged error. Concerning the microscopic test made in New York by Dr. Carpenter, the plaintiff contends that it is not reliable and should not be accepted for reasons urged in argument and which I need not repeat.

Now, between these conflicting claims, weighing and giving due consideration to all the testimony, you must judge. If the deceased died of some disease or disorder not necessarily resulting from the original injury, if there was an injury, then the defendant is not liable under this certificate of insurance; but if the deceased received an internal injury which in direct course produced duodenitis, and thereby caused his death, then the injury was the proximate cause of death.

In considering this case you ought not to adopt theories without proof nor to substitute bare possibility for positive evidence of facts testified to by credible witnesses. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence; where the weight of creditable testimony proves the existence of a fact it should be accepted as a fact in the case.

Where, if at all, proof is wanting and the deficiency remains throughout the case, the allegation of fact should be deemed not established.

There has been considerable testimony given by physicians, what we call expert testimony, and in the consideration of that testimony it is your province to determine which of these medical witnesses is right in his statement, opinion, or judgment. It is purely a question of fact for you which of these physicians was
136 most competent to form a judgment as to the cause of Dr. Barry's death. Who has had the best opportunities for forming a judgment as to the cause of death?

All this is to be taken into consideration by you in weighing and deliberating upon this evidence.

It has been shown upon cross-examination of one of the defendant's witnesses, Dr. Carpenter, that he has received compensation as an expert witness for his attendance here upon a former trial of this case. The court deems it its duty to say to you that if in good faith, without any corrupt or improper motive, compensation has been made to Dr. Carpenter in the way of defraying his expenses, or to recompense him for loss of time, that was entirely proper. Of course, in a case where there is a corrupt or improper motive in so doing, it would be otherwise.

I am asked to instruct you, gentlemen, that before the plaintiff can recover she must show that when the defendant received the proofs of death, on or about July 15, 1883, it either had cash on hand belonging to class AA, or that it levied an assessment upon the members, and by that means the defendant received money which belonged to class AA. This construction of the certificate is upon the theory that to entitle the plaintiff to recover it is essential to show either that it had money on hand with which to meet this loss or that it has made an assessment from which the loss can be paid.

Subscribed and sworn to before me this 30th day of January, A. D. 1886.

A. BIRKES,
Justice of Sup. Court.

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK, } ss:
141 *City & County of New York,* }

Elijah S. Parker, being duly sworn, deposes and says that he is worth the sum of ten thousand dollars ($10,000.00) over and above all just debts and liabilities and exemptions.

E. S. PARKER.

Subscribed and sworn to before me this 2nd day of February, A. D. 1886.

JAMES M. LACHENDE,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City & County of New York, }

I, Timothy Griffith, the clerk of the United States circuit court for the southern district of New York, do hereby certify that I have examined the above bond and have satisfied myself that the sureties above named are each worth the sum of ten thousand dollars ($10,000.00) over and above his just debts and liabilities and exemptions, and that the same is good and sufficient security for the judgment mentioned in said bond.

New York, this 10th day of January, A. D. 1886.

[SEAL.] TIMOTHY GRIFFITH,
Clerk of the United States Circuit Court for the Southern District of New York.

(Endorsed:) Approved. Chas. E. Dyer, judge.

Whereupon it is ordered that execution be superseded and
142 a writ of error and citation issued and copy of said writ of error lodged fer the defendant in error.

143 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals, now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts there-

from, being a transcript of record in the case of Theresa A. Barry *vs.* The United States Mutual Accident Association.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this first day of March, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

EDWARD KURTZ, *Clerk.*

144 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Theresa A. Barry, plaintiff, and The United States Mutual Accident Association, defendant, a manifest error hath happened, to the great damage of the said The United States Mutual Accident Association, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this sixteenth day of February, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th.

EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. Wis.

[Endorsed:] Filed February 16, 1886. Edw. Kurtz, clerk.

145 UNITED STATES OF AMERICA, *ss:*

[SEAL.] To Theresa A. Barry, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The United States Mutual Accident Association is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in said district, this sixteenth day of February, A. D. 1886, and of the Independence of the United States the 110th.

CHAS. E. DYER, *Judge.*

I accept service of the above citation this 25th day of February, A. D. 1886.

CHAS. M. BICE,
Att'y for Def't in Error.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 240. The United States Mutual Accident Association, plaintiff in error, *vs.* Theresa A. Barry. Filed March 26, 1886.

Office Supreme Court U. S.
FILED,
APR 3 1889
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 240.

THE UNITED STATES MUTUAL ACCIDENT ASSOCIATION, Plaintiff in Error,

vs.

THERESA A. BARRY, Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiff.

B. K. MILLER, Jr.,
Of Counsel.

E. H. HEINZE, PRINTER, NEW INSURANCE BUILDING, SAN FRANCISCO, CALIFORNIA.

In U. S. Supreme Court.

THE U. S. MUTUAL ACCIDENT ASSOCIATION,
Plaintiff in Error,
vs.
THERESA A. BARRY,
Defendant in Error.

No. 240.

FACTS.

T. A. Barry brought her action in the County Court for Milwaukee County, Wisconsin, whence it was removed to the U. S. Circuit Court for the Eastern District of Wisconsin.

COMPLAINT. (Record pp. 5–6.)

The complaint alleges that June 23, 1882, the defendant made, executed and delivered its policy of insurance to one John S. Barry, insuring him against death caused by accident or bodily injuries happening to him effected through external, violent or accidental means, in the sum of $5,000, for such time as he should continue to pay assessments; that in case of death of said Barry, by accident as aforesaid, it would, upon receiving proofs, etc., pay said sum to this plaintiff. That June 20, 1883, said Barry while attending to his professional duties and wholly without his fault, it became necessary for him to step or jump from a platform (or walk) to the ground beneath, about 4 feet, and in doing so and in lighting upon said ground he unexpectedly

received an accidental jar and sudden wrenching of his body, caused by said jump or step downward and by coming in contact with the ground. That said jarring of his person and wrenching of his body was the immediate cause of and directly produced a stricture of the duodenum, from the effects of which said Barry continued to grow worse until June 29, 1883, when he died. That proper proofs were furnished July 15, 1883, and defendant has not paid and refuses to. Judgment for $5,000 demanded.

AMENDMENT TO COMPLAINT. (Record p. 60.)

After the evidence was all in the plaintiff by permission of the Court against the objection of the defendant amended her complaint by alleging:

At the time of Dr. Barry's death and from that time and for the balance of the year 1883, and including the time as provided for in the policy in which the said insurance was to be paid to the plaintiff herein, there were insured by it in Class AA, the same class in which said Dr. Barry was at the time insured, 4,806 members or persons upon whom the defendant could have levied an assessment under its by-laws and rules of the $2 per head, and making an amount exceeding the plaintiff's claim of $5,000.

POLICY OF INSURANCE. (Record pp. 2–5.)

DIVISION AA. $5,000.

The U. S. Mutual Accident Association of the City of New York.

The certificate witnesseth, that the U. S. Mutual Accident Association * * hereby accepts John S. Barry * * as a member in Division AA * * subject to all the requirements and entitled to all the benefits thereof.

The principal sum represented by the payment of $2 by each member in Division AA of the Association, as provided in the by-laws (not to exceed $5,000), to be paid to Theresa A. Barry (his wife) * * within sixty days after sufficient proof that

said member * * shall have sustained bodily injuries effected through external, violent and accidental means, within the intent and meaning of the by-laws of the Association, and the conditions hereunto annexed, and such injuries alone shall have occasioned death.

Provided always that this certificate is issued and accepted subject to all the provisions, conditions, limitations and exceptions herein contained or referred to, * * and, provided, always that benefits under this certificate shall not extend to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate, * * nor to any case except where the injury is the proximate or sole cause of * * death.

* * * * * * *

And these benefits shall not be held to extend * * to any cause of death * * unless the claimant * * shall establish by direct and positive proof that the said death * * was caused by external, violent and accidental means, and was not the result of design either on the part of the member or of any other person.

Signed, etc., June 23, 1882.

BY-LAWS. (Record pp. 19–28.)

Art. 1, § 3. The object of this Association is to collect and accumulate a fund to be held and used for the mutual benefit and protection of its members.

Art. 7, § 1. Upon sufficient proof that a member of one of the divisions shall have * * [died] * * the board of directors shall immediately order an assessment of $2 upon each person who was a member of the division to which deceased belonged at the time of his death, and shall pay the amount so

collected * * to the person * * designated [as] beneficiary.

ANSWER. (Record pp. 7–8.)

Defendant admits and alleges that it is a corporation duly incorporated and organized * * as an accident insurance company on the co-operative or assessment plan.

The issuance of the certificate is admitted, and that J. S. Barry died June 29th, 1883, and that defendant was notified of his death and that plaintiff has demanded and defendant has refused to pay said sum of $5,000. Then followed a denial of all other allegations.

TRIAL.

Defendant objected to any evidence under the complaint for the reason that it does not state facts sufficient to constitute a cause of action.

Objection overruled; defendant excepted.

Policy of insurance offered in evidence.

TESTIMONY OF J. R. PITCHER, SECRETARY OF DEFENDANT.

June 23, 1882, there were 804 members in Division AA.

June 23, 1883, there were 4,803 members in Division AA.

June 23, 1884, there were 5,626 members in Division AA.

During June and July, 1883, the defendant, in case of a death in Division AA could have levied a $2 assessment on at least 4,803 members. If the defendant had desired to pay the loss occasioned by the death of John S. Barry the amount would have been $5,000.

On June 29, 1883, defendant had on hand belonging to class AA $2,060.15. (p. 17.)

Proofs of death. (p. 29.)

ATTENDING PHYSICIAN'S STATEMENT.

Dr. Frederick L. Herschman: Was first consulted by [Dr. Barry] June 23, [1883], at 2 A. M. Examined his person.

Q. What, if any, external or visible sign did you find as to any personal bodily injury caused by external and accidental violence?

A. A small lump (tumor) painful to the touch, in the right side below the stomach. This did not appear until about the third day

Local symptoms. Pain, vomiting, sleeplessness, jaundice tenesmus.

Q. What in your opinion was the cause of death?

A. Inanition and bile circulating in the blood.

STATEMENT OF EYE-WITNESSES. (p. 30.)

Drs. F. L. Herschman and J. A. Crowell: He was injured at Iron Mountain, Mich., June 22, 1883. An internal strain was the nature of his injury. To get out of the house we had to jump from a platform. Dr. Barry jumped first and came down quite hard—so much so that Dr. Crawell and I spoke of it. He said it did not hurt much. We drove home and he went to bed.

TESTIMONY OF BENEFICIARY. (pp. 31–32.)

T. A. Barry (wife): My husband, Dr. Barry, came home sick June 20, 1883, about 6 P. M. He was unusually pale—distressed looking—as though he were suffering. He tried to eat and drink. Sat at table about 5 minutes. He said his stomach was distressed. He was very sick. He was perfectly well up to that time. He went to bed. He didn't vomit till later in the evening. Dr. Jones arrived between 8 and 9 o'clock. He never retained anything on his stomach after that. He vomited every few minutes; it commenced a little before Dr. Jones got there. He vomited probably ten times a day, * * more frequently

towards the last. He died June 29, 1883. We had Drs. Jones and Hirschmann and Dr. Mason, of Milwaukee.

CHARLES MCELROY SWORN FOR PLAINTIFF (p. 32.)

Saw Dr. Barry [June 24, 1883.] His face was greenish and yellow—pallid—and he was vomiting and retching almost continually while I was there. I called frequently and sat up with him almost all the time of his sickness.

TESTIMONY OF DR. F. L. HERSCHMAN.

His testimony (record pp. 33-41) tended to show that up to the time of the final illness deceased had been a healthy man. That witness was called June 23, 1883. He there gives the details of the facts relied on to establish an accident which we quote in full hereafter. There the witness testified that he attended Dr. Barry till his death and called upon him two to four times; that he remembers no fecal matter passing through him and that this would indicate intestinal obstruction. (p. 35.) The physicians two days before his death made a diagnosis of inflammation of duodenum sufficient to produce an obstruction which is called duodenitis. Witness assisted at post mortem. The duodenum was in his opinion costricted or narrowed. (p. 36.) In his opinion a jar to the body might be sufficient to produce a twisting or knotting of the duodenum.

CROSS-EXAMINATION.

I didn't see any twisting of the duodenum. (p. 37.) The size of the duodenum was normal. In my practice I have never heard of the duodenum being twisted. I made no microscopical examination. (p. 38.)

TESTIMONY OF DR. B. W. JONES.

The diagnosis of this witness was duodenitis. (p. 42.)

On cross-examination he testified the calibre of the intestine was normal and that the inflammation was catarrhal. (p. 43.) On re-direct examination he testified that there was no constriction of the duodenum, but it was closed by the swelling of the mucous membrane and that they didn't see it on post mortem but concluded it from the symptoms. The swelling had disappeared. (p. 43.)

Testimony of Dr. Mason.

He was called from Milwaukee to consult relative to the case. He saw deceased four or five days before his death. (p. 43.)

He concluded that Dr. Barry had inflammation of the duodenum and that duodenitis might be produced by a jump or very severe jar of the body. (p. 44.)

On cross-examination witness said this was the only case of duodenitis he ever saw. Witness was not at the post mortem.

Testimony for the Defence.

Testimony of the attorney of the defendant, Wm. Bro. Smith, showed that he obtained from the physicians who had made the autopsy the duodenum and one or two other portions of the intestine of deceased. That these specimens were put in a can of alcohol, tied up and sealed in the presence of the attending physician and delivered to Dr. Carpenter in New York. (p. 45.)

Dr. Wesley M. Carpenter, Instructor in Pathological Labratory of New York, Curator of Bellevue Medical Hospital, New York, Fellow of the Royal Society of Physicians, etc., etc., identified the specimens. (p. 46.) He found a 7 inch piece of the duodenum, 9½ inches of the colon and a piece of the ilium, with part of the ascending colon. (p. 46.) He made careful examination of all the pieces and they were all normal in size and every other respect except the ilium which was abnormally small. He made probably 100 sections from the duodenum and it was entirely normal and had never been the seat of inflamma-

tion. If there had been inflammation, evidence of it would not have disappeared. In his opinion duodenitis could not be caused by a jump as described. The narrowness of the ilium was congenital; (p. 47.) This duodenum was never the seat of inflammation or occlusion sufficient to cause death. (p. 48.) From his examination he should say death did not result from a constriction or occlusion of the duodenum. (p. 52.)

The testimony of Dr. Francis Delafield, (p. 53), Dr. E. G. Janeway, (p. 54) and of Dr. E. F. Ward, (p. 55) was all to the same effect as the testimony of Dr. Carpenter, as was also the evidence of Dr. Solon Marks, (p. 55) and Dr. William Fox, (p. 57), both of Milwaukee. They all agreed that duodenitis was not present and could not be caused as claimed by the plaintiff.

When the testimony was closed, (p. 61), defendant demanded that the court submit a special verdict, and as provided by the rules of practice in the State of Wisconsin, and as a question upon such special verdict to submit the following question: "Whether the death of Dr. Barry was caused by duodenitis." Which demands were refused and defendant excepted.

Thereupon defendant asked the court to submit in connection with the general verdict the special question whether the assured died of duodenitis. Which request was denied and defendant excepted.

In other words, evidence taken as a whole shows that one afternoon deceased jumped off a platform 3 to 5 feet high and came down so hard as to attract the attention of those with him. That some time afterwards he drove home, and on his arrival was feeling sick and went to bed. A physician was called about 2 or 3 A. M. the same night, and that deceased complained of pain in bowels, and from that time until he died, some nine days thereafter, he vomited and passed little fecal matter and died. The country physicians with Dr. Mason, of Milwaukee, made a diagnosis of duodenitis, and were confirmed in this conclusion by a hasty and apparently careless autopsy. Experts in New York deny positively that there was duodenitis or that it could

be caused as indicated. The question was left to the jury which as usual decided in favor of the plaintiff.

ASSIGNMENT OF ERRORS.

1. Refusal of the trial court to submit a special verdict.

2. Refusal of the trial court to restrict the case to the issues made up by the pleadings, viz., death from accident and resulting duodenitis.

3. No evidence to support the verdict because no accident was shown.

4. Plaintiffs not entitled to recover at law without proving an assessment of the members of defendant corporation.

ARGUMENT.

I.

The Court erred in not directing a special verdict.

R. S. of Wisconsin, 1887, § 2858, provides:

> "The Court in its discretion may, and when either party at or before the close of the testimony and before any argument to the jury is made or waived shall so request, the Court *shall* direct the jury to find a special verdict. Such verdict shall be prepared by the Court in the form of questions in writing, relating to only material issues of fact and admitting a direct answer, to which the jury shall make answer in writing.
>
> The Court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact, to be stated as aforesaid.
>
> In every action for the recovery of money only or specific real property, the jury may in their discretion when not otherwise directed by the Court render a general or a special verdict."

If requested in proper time it is obligatory upon the judge to submit a special verdict; "the Court *shall* direct the jury to find a special verdict."

In Schatz vs. Pfeil, 56 Wis., 434, (1883), the court say:

"Under section 2858 the court *must* direct the jury to find a special verdict on the whole case when such verdict is requested by either party as prescribed in said section."

In Fenelon vs. Butts, 53 Wis., 352, (1881), the court say:

"The Circuit Court committed no error in not directing the jury to find a special verdict under section 2858 R. S., *for it was not requested by either party.*"

This is the general rule in states where a similar statute is in force.

"Where the statute provides that the court, at the request of either party, *may* submit certain questions to the jury, it lies within its discretion to submit them, and a refusal to do so is not erroneous. But if the word *shall* is used, the request is obligatory and must be complied with if the request has been made within the proper time."

Article by W. W. Thornton in 20 Am. Law. Rev. 377 and notes 3 and 4.

This statute is binding upon the federal courts.

Section 914, R. S. U. S., provides that "the practice, pleading, forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the Circuit and District Courts of the United States, *must* conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in the courts of record in the State within which such Circuit or District Courts are held."

"The act of Congress is to a large extent mandatory."

Indianapolis, etc., R. R. Co. vs. Horst, 93 U. S., 301.

There are two forms of procedure in Wisconsin as in many other States. One of these is by an ordinary special verdict in which the jury decides all the facts and upon which a judgment

is rendered as in Easton vs. Hodges, 106 U. S., 411 (1882), where the Court say:

"It is not necessary, in this opinion, to enter upon the examination of those decisions, or to consider how far the local law controls in determining either the essential requisites of a special verdict in the courts of the United States, or the conditions under which a judgment will be presumed to have been supported by facts other than those set out in a special verdict."

The second method is by submitting a general verdict and adding certain special questions.

In the case at bar a special verdict was demanded, and when that was refused a special finding was requested.

The error assigned refers only to the refusal of the court to submit a special verdict. The refusal to submit a special finding in addition to the general verdict was clearly not error in view of the decisions in Indianapolis R. R. Co. vs. Horst, 93 U. S., 299 (1876), where the court say: "But where it [a state statute] prescribes the manner in which the judge shall discharge his duty in charging the jury, or the papers which he shall permit to go to them in their retirement as in Nudd vs. Burrows [91 U. S., 441, (1875)], *or that he shall require the jury to answer special interrogatories in addition to their general verdict*, as in this case, we hold that such provisions are not within the intent and meaning of the act of Congress, and have no application to the courts of the United States. These are all matters relating merely to the mode of submitting the case to the jury."

"The purpose of this statute (17 Stat., 197, § 5, R. S., § 914,) the court say in Nudd vs. Burrows, 91 U. S., 441, 'is apparent upon its face.' No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State Courts of the same locality. It had its origin in the code-enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms and practice were adhered to, in the State courts of the same district—the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things was obvious. The evil was a serious one. It was the aim of the provision in question to remove it."

It would seem, however, that a particular form of rendering a verdict was certainly a "form or mode of proceeding" within the true intent and meaning of the statute.

In re Chateaugay Ore & Iron Co., 9 S. Ct. Reporter, 153, (1889) the court say: "It does not include state statutes requiring instructions to the jury to be reduced to writing, or those which permit such instructions, and certain papers read in evidence, to be taken by the jury when they retire, or those which require the jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues."

In other words the statute cannot restrict the powers and privileges of the trial judge or limit him in the exercise of his power at common law or under the judiciary act.

But submitting a special verdict does none of these things. The trial judge can instruct the jury. He even settles the questions submitted to them and has the same full control over the verdict, parties and judgment that he always did.

A special verdict is not an innovation of the codes; it was recognized at common law and used under the old forms of procedure, although its origin is obscure. (20 Amer. L. Rev., p. 367.) It is a right the value of which could not be better exemplified than in the case at bar.

II.

The trial court erred in not restricting the case to the issues made up by the pleadings.

The issue by the pleadings was "accidental death from duodenitis." The issue submitted by the court was accidental death from anything.

The complaint (Record p. 6), alleges that deceased jumped off a low platform and "unexpectedly received an accidental jar and sudden wrenching of his body caused by said jump."

"That the said jarring of his person and wrenching of his body caused as aforesaid was the immediate cause of and di-

rectly produced a stricture of the duodenum from the effects of which * * [he] died."

The answer denies this.

So the issue certainly was whether the insured died of duodenitis caused by an accident.

The proof of claim (Record p. 29), states that the injury was "Inflammation of duodenum from jarring (jump.)"

The entire trial was taken up with the question of whether Dr. Barry died of duodenitis or not. If he didn't die of that no one can say what he did die of. It was the only evidence which plaintiff claimed tended to prove an accident.

At the close of the trial (Record p. 61.), defendants requested the court to submit the following question to the jury: "Whether the death of Dr. Barry was caused by duodenitis;" this demand was twice refused and defendant twice excepted.

Defendant then demanded the following instruction to the jury (Record, p. 62, No. 11), "If you find that Dr. Barry did not die from duodenitis then your verdict must be for the defendant." This was refused and defendant excepted.

Defendant then requested an instruction that Dr. Barry did not die of duodenitis (Record p. 62, No. 12), which was likewise refused and an exception taken.

The judge charged the jury (Record p. 64), in effect that if the assured sustained internal injury of any kind by his jump and died therefrom the plaintiff could recover. His exact words are:

"The case therefore resolves itself into three points of inquiry:

1. Did Dr. Barry sustain internal injury by his jump?
2. Was it effected through external, violent and accidental means * * of which there was an external and visible sign?
3. Was such injury the proximate cause of his death?

To entitle the plaintiff to a verdict each and all of these questions must be answered by you in the affirmative.

Record pp. 64–65.

We objected to these rulings because the questions submitted to the jury were more comprehensive than the issues made by the pleadings.

By the pleadings the plaintiff's claim was for a death caused by duodenitis. That the accident was to the duodenum. The question left to the jury was in effect whether there was an internal injury at all which caused death. This was a surprise to defendant. It was something of which the pleadings gave him no notice. Neither the proofs of loss nor the testimony made any such claim.

It is a general rule that the allegata and probata must agree. If a party plead with too great particularity he must make his proof accordingly.

> "Yet it often happens that when material matter is alleged with unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected as to be incapable of separation, and the opposite party is, therefore, entitled to include, under his traverse, the whole matter alleged. The consequence, evidently, is that the party who has pleaded with such unnecessary particularity has to sustain an increased burden of proof, and incurs great danger of failure at the trial."
>
> Stephens Pl., [*425.]

> "The statement of immaterial or irrelevant matter or allegations, is not only censured, as creating unnecessary expense, but also frequently affords an advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleadings to adduce more evidence than would otherwise have been necessary. It is therefore of the greatest importance in pleading, to avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary."
>
> 1 Chitty's, Pl., 228.
>
> See also Bliss Code, Pl. (2nd ed.) p. 336, § 215.

In other words plaintiff alleged an accidential injury to duodenum. The defendant denied such an accident. The proof was directed almost entirely to this question. The court left it generally to the jury to say whether there was any accidental injury of any kind; thus submitting to the jury questions not raised by the pleadings or covered by the evidence.

III.

There was no evidence to support the verdict because no accident was shown.

The policy was to insure Dr. Barry against death by accident, provided he

> "shall have sustained bodily injuries effected through external, violent and accidental means * * and such injuries alone shall have occasioned death."
>
> Record pp. 2-3.

> "Provided, always, that benefits under this certificate shall not extend to hernia nor to any bodily injury of which there shall be no visible sign nor to any bodily injury happening directly or indirectly in consequence of disease nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease * * nor to any case except where the injury is the proximate or sole cause of the disability or death * * * * nor to any case of death or personal injury unless the claimant, under this certificate, shall establish by direct and positive proof that the said death or personal injury was caused by external, violent and accidental means * * *
>
> Record pp. 3-4.

In this case there is absolutely no proof of an accident.

The statement of an eye-witness is as follows: (Record p. 30.)

Q. What was he doing at the time of the injury?

A. Attending to his legitimate business. To get from the house to the ground he had to jump from a platform.

Q. What was the nature of his injury?

A. An internal strain.

Q. Give in detail all the circumstances attending the injury?

A. Dr. Barry, Dr. Crowell and myself went to see a patient. To get out of the house we had to jump from a platform. Dr. Barry jumped first and came down quite hard—so much so that Dr. Crowell and I spoke of it. He said it did not hurt much. We drove home and he went to bed.

This "eye-witness" was called by plaintiff as a witness upon the trial.

He says: (Record p. 34.)

"Just after we had jumped, Dr. Barry jumped and he came down so hard that it attracted our attention and we both turned round and we both remarked that it was a heavy jump, and I asked him, 'Doctor, are you hurt?' and he said, 'No, not much.' * * The way Dr. Barry came down sounded to us both as if he came down solid on his heels, so much so that we both turned round and remarked, 'Doctor, you came down heavily.' And I asked him, 'Are you hurt?' and he said, 'No, not much.' I heard the noise. It was a singular jump and sounded like an inert body."

This all the evidence there is of any "accident."

There was no evidence of any twisting, turning, wrenching or straining of the body. No evidence that he did not alight just as he intended and in the way he intended.

Defendant asked as instruction, (Record p. 62, No. 4.)

"That no accident within the true intent and meaning of the policy occurred to Dr. Barry."

Which was refused.

The court instructed the jury, (p. 66.)

"Now, was there anything accidental, unforeseen, involuntary, unexpected in the act of jumping, from the time the deceased left the platform until he alighted the ground?"

Again. (p. 67.)

"Was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground or in the act of alighting? Did he or not alight on the ground just as he intended to? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose, or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body in the downward movement or in the act of alighting on the ground? These are points directly pertinent to the question in hand."

Again. (p. 68.)

"But if, in jumping or alighting on the ground, there occurred from any cause, any unforeseen or involuntary move-

ment, turn or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstances which interfered with or changed such a downward movement as he expected to make or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means."

There is not a scintilla of evidence that any one of these things happened. So far as the evidence goes, Dr. Barry voluntarily jumped off the platform, alighted squarely on his feet without falling, in fact did exactly what he intended to do and in the way intended.

An accident in its broadest sense is "an event from an unknown cause or an unusual and unexpected event from a known cause."

1 A. & E. Ency. of Law, 82.

Was this death caused by an accident?

A very similar case is Southard vs. Ry., etc, Assurance Co., 34 Conn., 574, where a man ruptured himself by jumping from a train, where the court say: (p. 578.)

"The policy is one of indemnity against 'bodily injuries effected through *violent and accidental means*, within the meaning of this contract, and the conditions hereto annexed. * * It would not help the matter to call the injury—that is, the rupture—an accident. That was the result, and not the means through which it was effected. The jumping off the cars, or the running was the means by which the injury was caused. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental and involuntary movement of the body whatever. There was no stumbling or slipping or falling. There was nothing accidental in his movements, any more than there was in his passing down the steps of his hotel, or in his walking on the street, during each of which he might have had a stroke of apoplexy, or a hemorrhage—a rupture of a blood-vessel in the head or the lungs. True, in jumping from the cars, and running, there was more violence, or properly speaking, more force; but there was no more accident than in any ordinary movements of the human body. How then, admitting the rupture to have been effected by

jumping from the cars, or by running to see if they were coming, can it be said that it was caused by *accidental*, as well as violent, means? All the accident there was, was the result of ordinary means, voluntarily employed, in a not unusual way. * * But, as I have already stated, the injury which he received was in no sense the result of accident. He jumped from the cars with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect upon the ground, just as he intended to do. * * Assuming that this rupture was caused either by his jumping, running, or both, does not help the matter, unless we call running and jumping accidents."

McCarthy vs. Travelers Ins. Co., 8 Biss., 364, was tried by the same judge who tried the case at bar. The policy was to all intents and purposes the same. Deceased was swinging Indian clubs and ruptured a blood vessel, and the judge instructed the jury:

"If the deceased voluntarily took in his hands the clubs for exercise, and used them for such exercise in the way and precisely as he intended to do, and without anything occurring to interfere with his intended and usual movements in such exercise; that is, if he voluntarily used them in the ordinary way for taking such exercise, without the occurrence of any unusual circumstance interrupting or interfering with such use, or causing any unforeseen, accidental or involuntary movement of the body, and in such use of the clubs there occurred the rupture of a blood vessel and consequent injury as claimed, I do not think it could then be said that the means through which the injury was effected were accidental."

However, if there was an accident it does not follow from the evidence that he died therefrom.

After the jump they all went to a drugstore and met some gentlemen there. The witnes (p. 34) went and did some errands and in a short time deceased and witness took their buggy and drove home.

"After we left Iron Mountain the doctor looked pale—that is, on our return from Iron Mountain to Norway. It may have been half an hour after the jump." The deceased drove all the way home. That he was sick that night and continued sick till

the date of his death, and although he may have died of an obstruction of the bowels or even from duodenitis, there is absolutely no evidence that his death was caused by the jump. It is a clear case of the fallacy post hoc ergo propter hoc.

IV.

No recovery at law was recoverable in this action, certainly not for more than nominal damages.

The policy of insurance provided that "the principal sum represented by the payment of $2 by each member in division AA * * as provided in the by-laws," should be paid to Mrs. Barry. (Record p. 2.)

The by-laws provide that "the board of directors shall * * order an assessment of $2 upon each person * * and pay the amount so collected." No evidence of an assessment was offered or given.

The contract between the parties is not that the defendant will absolutely pay $5,000 or any other sum, but that it will levy an assessment and pay over the proceeds thereof. Plaintiff's remedy was clearly in equity for a specific performance and even if an action at law will lie it would be for breach of covenant, the damages would be merely nominal.

Our policy provides. (Record p. 2.)

"The U. S. Mutual Accident Association * * accepts John S. Barry * * as a member in division AA of said association, subject to all the requirements and entitled to all the benefits thereof.

"The principal sum represented by the payment of $2 by each member in division AA * * as provided in the by-laws (* * not to exceed $5,000) to be paid to Theresa A. Barry (his wife,) within sixty days after sufficient proof that said member [died] within 90 days from the happening [of the accident]" * *

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BY-LAWS. (Record p. 19.)

Article 1, § 3. The object of this association is to collect and accumulate a fund to be held and used for the mutual benefit and protection of its members * *

Article 7, § 1. Upon sufficient proof that a member of one of the divisions shall have * * [died] etc., * * the board of directors shall immediately order an assessment of $2 upon each person who was a member of the division to which deceased belonged at the time of his death and shall pay the amount so collected * * to the person or persons * * designated [as] beneficiaries.

See §§ 6 and 7.

In *Curtis vs. Mut. Ben. Life Co., 48 Conn., 98*, the policy provided:

"Upon the death of E. M. C. * * an assessment for as many dollars as there are policy-holders in this company * * shall be made * * and the sum so collected * * shall be paid to S. C., * * in no case to exceed $1,000.

"Only breach assigned is of a promise to pay $1,000. * * But the agreement was merely to lay an assessment * * and pay the amount to the plaintiff. There is no allegation of any neglect to lay such assessment, or, having laid one, to pay over the amount. And not only is there an omission to state any facts to show ground for the defendants liability, but nothing to show the amount, and no data are given from which it may be computed. "The $1,000 is not promised to be paid by the terms of the contract, but is mentioned merely as a limit of liability."

Motion in arrest of judgment prevailed.

In *Eggleston vs. Centennial Mut. Life Assn., 18 Fed., 14.* The policy provided. "The only action maintainable upon this policy shall be to compel the association to levy the assessments herein agreed upon, and if a levy is ordered by the court, the association shall be liable, under this policy only for the sum collected under an assessment so made."

Supreme Court U. S.

Held: The only remedy is in chancery to compel a specific performance.

The same case came up a second time (19 Fed., 201), upon a motion to strike out a portion of the answer. This was refused and the plaintiff remitted to equity.

In *Smith vs. Covenant Mut. Ben. Assn., 24 Fed., 685.* The policy provided that upon satisfactory proofs of death, etc., being made "an assessment shall be levied * * and the sum so collected on such assessments, * * the association agrees well and truly to pay * * to his devisees."

Held: "In order to entitle the heirsto recover at law they must allege and show a collected assessment and failure to pay."

This was on demurrer to complaint.

In *Covenant Ben. Ass'n vs. Sears, 114 Ill., 108.*

Bill in chancery was filed to recover $5,000.

The policy provided that "an assessment shall be levied and the sum so collected on such assessments the association agrees to pay, etc."

Objected that there was adequate remedy at law.

"The certificate of membership does not contain any contract to pay * * $5,000 or any sum, absolutely but to levy assessments * * and to pay over the sum so collected on such assessments * * and the association stands as a trustee of a fund in the hands of its numerous members but belonging to the beneficiaries, which can be called in by assessments for their use." Remedy in equity complete "by directing a specific performance of the contract of debt by the levying of the proper assessments."

In *re Solidarite M. B. Ass'n, 68 Cal., 392.* The by-laws provided upon the death of a member and in order to make up the amount to be paid over to his nominee each member shall pay $1. "It was further provided his nominees should be entitled to claim and receive from the association the amount collected on the assessment to be levied therefor."

The court say: "In our opinion, the appellant was entitled to claim * * only the sum actually collected on the assessment and not $1 for each and every member."

In *Taylor vs. Nat. Tem. Relief Union, 17 Ins., L. J. 109.* The policy provides: "Sixty days after due proofs of death * * the said union promises and agrees to make an assessment on all of its members * * and pay the amount collected * * to Mary E. Taylor, wife."

"Held: "It is true the petition avers that defendant refused to pay said sum, but it wholly fails to aver that it had assessed and collected the sum—the two facts upon which the obligation rested. The petition to have made a case for the recovery of the $1,000 should have averred that defendant had made an assessment and had collected a sufficient amount to pay but refused to pay." Demurrer sustained.

In *Ball vs. Granite State Mut. Aid Ass'n, 9 Atlantic, 103,* the action was in assumsit, debt. Policy provided company would pay "a sum equal to the amount received from death assessment, but not to exceed $5,000."

Held: "The case finds that there was no evidence tending to show the amount received from one death assessment * * and the jury was instructed to return a verdict of $5,000 * in case they found for plaintiff. This was error. The plaintiff was entitled to a sum equal to the amount received from one death assessment. If there was no evidence to show what that sum was, he could recover only nominal damages. New trial ordered.

In *Ranisbarger vs. Union Mut. Aid Ass'n, 72 Iowa, 191,* (action at law) the certificate promised to pay the net proceeds of one full assessment, viz:

"The Secretary shall make an assessment upon each member * * The proceeds of such assessment, not exceeding $2,500 shall be paid to the beneficiary." It was alleged in complaint one assessment would amount to $2,500.

Court held: "It did not contract for the payment of a specified sum, * * but its undertaking was that it would make an

assessment * * and pay over the proceeds. * * We considered this question in B. vs. M., 27 N. W., 770, and we there held the action could not be maintained. The remedy of the beneficiary, if any, is by a proceeding to compel the association to make the assessment." Judgment reversed.

In *Bailey vs. Mut. Ben. Assn., 71 Iowa, 689,* the policy provided that the company would pay "the net proceeds of one full assessment * * not to exceed $3,000."

Articles of incorporation provided "The amount due and payable under any certificate of membership * * shall be the net amount collected on the advance assessment previous to the death * * and received at the principal office of the association."

No averment in complaint as to what the proceeds of assessments were. Plaintiffs claim there was no assessment and their theory is that they are entitled to recover outside of the terms of the contract, viz., the gross amount of what an assessment would have been if it had been made. * * Their position cannot be maintained. * * Their remedy is, manifestly, not an action at law to recover what would be the amount of an assessment if made.

Newman vs. Covenant M. B. Assn., 72 Iowa, 242, was an action at law. The policy provided: "An assessment shall be levied * * and the sum so collected * * the association hereby agrees, to pay, etc. Defendant admitted it had made no assessment and refused to, but if one had been made it denied it would have brought in $5,000 or any part thereof.

"The theory of the plaintiff is that if * * defendant disclaims all liability to pay the claim and refuses to make an assessment, it thereby becomes liable to pay the maximum sum named in the certificate. * * But in our opinion the plaintiffs position cannot be sustained. The extent of defendants obligation is fixed by the certificate. * * The association does not agree to pay any sum. * * It merely agrees to levy an assessment and pay over such sum as may be collected. * * If the

company, doubting or denying its liability * * refused to levy an assessment, the contract is not thereby changed and the company's liability extended. It may be conceded that a wrongful refusal to make an assessment would be a breach of the contract. But we are unable to see how more than nominal damages could be recovered for such breach, * * nor can either party invoke any presumptions as to how many would have paid and how many would have refused payment."

The judgment was reversed.

Tobin vs. Western M. A. Society, 72 Iowa, 261, the policy provided: The company undertakes to pay "the net proceeds of one full assessment * * not exceeding $2,000."

"A certificate in above form does not justify a judgment for the maximum amount," but it was stipulated if court found no error it might order judgment that defendant make an assessment and it was so ordered.

It is respectfully submitted that the judgment should be reversed.

FINCHES, LYNDE & MILLER,
Defendant's Attorneys.

B. K. MILLER, JR.,
Of Counsel.

MILWAUKEE, WIS., January 17, 1889.

Office Supreme Court U. S.
FILED,
FEB 19 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

—OF THE—

UNITED STATES.

UNITED STATES MUTUAL ACCIDENT ASS'N,

Plaintiff in Error.

vs.

THERESA A. BARRY,

Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

This action was begun in one of the State Courts of Wisconsin, and by the plaintiff in error was removed to the U. S. Court.

The action was instituted to recover the amount of an accident insurace policy and was twice tried below—the jury having failed to agree on the first trial.

An examination of the record, disclosing as it does the frivolous character of the objections raised by counsel, we think, cannot fail to convince any one that this case has been brought here for the express and sole purpose of delay.

For the sake of conciseness we shall consider, in their order, the four so called Assignments of Error and shall aim to be as brief as possible in view of the expansive character these alleged errors have been made to assume.

I.

REFUSAL OF TRIAL COURT TO SUBMIT A SPECIAL VERDICT.

As counsel have endeavored, evidently, to entrap the Court in this request, and thereby "hang up" this case, we respectfully insist on the observance of all the forms.

First, the Court had the right to refuse the request coupled as it was with a contingent. The motion was not only to submit a special verdict, but it was also urged that a specified interrogatory should be submitted. Long before special verdicts found their way into the state statutes it was discretionary with the Court to submit interrogatories to be answered by the jury. My friends seem to have failed to distinguish between a "special verdict" and "interrogatories" otherwise they would not have embraced two dissimilar subjects in the same motion. Besides, even in those states where special verdicts are a matter of right to the parties, it is never the duty of the Court to prepare the verdict, but Courts have invariably held it to be the duty of the counsel, demanding, to prepare it.

Pettiburg, etc., R. R. Co. vs. Ruley, 38 Ind., 294.

Hopkins vs. Stanly, 43 Ind., 533.

It does not appear that any special verdicl was presented to the Court by anyone for submission, but the contrary must be inferred when counsel in their motion request that the one solitary question proposed by them "shall form a part of" the verdict, presumably to be prepared by the Court. Conceding then, for the present, that it was the

duty of the Court to submit a special verdict we claim that plaintiff in error has not placed itself in proper position to entitle it to an exception and review in this Court.

Let us now consider this objection on its merits, if it has any. It will doubtless be claimed that because the state practice provided for special verdicts that *ergo* so should the Federal Courts sitting in such state allow the same. This presents a very different question than would arise had the Court submitted a special verdict and such submission was alleged as error.

Hodges vs. Easton, 106 U. S., 408.

The right to demand a special verdict in a Federal Court because the state practice allowed it was expressly passed upon by this Court in the case of

Indianapolis, etc., R R. Co. vs. Horst, 93 U. S. 300.

It was there decided that the form of the verdict, etc., were all matters relating merely to the *mode of submitting the case to the jury*, and was not covered by the act of 1872. The "conformity" required by this act is "as near as may be" and not as near as may be *possible* or *practicable*, and the statute was held to be mainly directory and not mandatory.

The statute was intended to give trial judges power to reject (as Congress expected they would) any subordinate provision in the state statute which in their judgment might embarrass the administration of the law. These principles were also fully discussed in

Nudd, *et. al.*, vs. Burrows, 91 U. S., 441,

and the true rule stated. It was sought to compel the Federal Court, sitting in Illinois, to follow the state practice in charging the jury and reducing the charge to writing, etc. This Court held that such was not contemplated by the act

of 1872, which only requires that the practice pleadings, forms and modes of proceeding, shall conform as near as may be to the state practice.

It would seem absurd to contend that under a mere directory statute it was ever intended by this act to sweep out of existence a system so long prevailing, and to place in its stead this garish damsel from the state code, just brilliant and languishing enough to captivate but too ethereal and effeminate to be of any practical service in the administration of justice.

Suits are not begun in the same way in the two Courts; costs are not similarly taxed; a motion for a *non* suit has a vastly different meaning in the two Courts, and thus on *ad infinitum* the practice in those minor matters always has been and always will be very dissimilar in the State and Federal Courts

Besides all this, it has been held that wherever Congress has legislated in a *general* or *special* way on a subject that such legislation must fix the mode of precedure. Sec. 648, R. S. U. S. Construing this Sec. in the light of the then existing practice, the meaning is very evident.

The provisions of the judiciary act of 1789, which are restated in the act of 1872, Mr. Abbott says "were intended to govern the substantial determination of the right of the parties involved in the issue; but in the mode of conducting the inquiry the state laws are not as to all details the invariable guide."

II Vol. Abb. Pr., Sec. 243.

II.

REFUSAL OF TRIAL COURT TO RESTRICT THE CASE TO THE ISSUES MADE BY THE PLEADINGS.

The Record shows that after the case was opened to the jury plaintiff in error objected in a general way, and without specification, to any evidence under the complaint. This was overruled and rightly by the Court under a well known rule. This was followed by another objection, viz: "That the complaint did not allege any assessment." And this is doubtless the first objection with specification added.

As the discussion of this objection would invade the ground covered by the fourth alleged error we forbear any further reference to it at this time, except to say that we disagree with counsel upon the necessity of any such allegation in the complaint.

The Court, evidently considering the grounds of the second objection the basis of the first, ruled that the testimony be admitted subject to objection.

The defendant in error then offered the deposition of Mr. Pitcher, the Secretary of the plaintiff, (fol. 36) to show the number of members in class *A.A* upon whom the Association could have made an assessment. This was for the purpose of fixing the *amount* of plaintiff's liability. No objection was offered to this testimony. After the testimony was closed defendant in error moved the Court to be allowed to amend the complaint to conform with the proofs (fol. 118) which was allowed under the liberal rule of the state practice.

Sec. 2830, Statute of Wis., 1878, provide: "The Court may upon the trial or at any other step of the action, before or after judgment, in furtherance of justice and upon such

terms as may be just, amend any process, pleading or proceeding * * * by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleadings or proceeding to the facts proved.

Under this statute the Supreme Court of Wis. have given the widest possible discretion to the Trial Court. It has also been held that when defendant objects to a proposed amendment he can only ask that *terms* shall be imposed as a condition. He cannot ask the Court to deny the amendment which is a right secured by statute.

Thomas vs. Hatch. 53 Wis., 296.
36 Wis., 564.
14 Wis., 605.

Had the Association objected to the testimony of Mr. Pitcher possibly the amendment would not have been allowed without terms, though subsequent research has raised a serious doubt in our minds of the necessity of any amendment.

It was held in a similar case that Ins. Co. was liable for the maximum amount stated in the policy and that any reduction would be matter of defense.

Lueders, Exr., vs. Hartford Life, 12 Fed., Rep. 465.

III.

NO EVIDENCE TO SUPPORT THE VERDICT BECAUSE NO ACCIDENT WAS SHOWN.

The evidence, without recapitulating it here, shows that the deceased, Dr. Barry, received his injury by accidental means. His jump downwards—manner of alighting upon the ground, striking heavily upon his heels—giving forth a sound like an inert body so as to attract attention

and cause remark (folio 70). His sudden appearance of sickness; his previous robust health; his dizziness in driving home; his retching and vomiting, kept up almost constantly without passage till death ended his miseries, all point, as the physicians said, not only that the invagination or occlusion of the intestine was caused by the jar occasioned by that fatal jump, but that he died from that injury and that alone.

Had the Doctor jumped and alighted in the usual way and received this injury it is more than doubtful if the defendant would be liable under the policy. This seems to be the view of the Court in

Southard vs. Ry. Pass. Ass'n Co., 34 Conn, 574.

But the exception which admits the case at bar and clearly draws the line of liability was stated by that Court in this language: "Had the insured stumbled, slipped or lost his balance and fell, or had he struck upon an unforseen object, his injury might be attributed to accidental as well as violent means."

The same doctrine is stated in yet clearer terms, and more applicable in its facts to the case at bar in

J. McCary vs. Trav. Ins. Co., 8 Ins., L. J., 208.

N. Am. Ins. Co. vs. Borroughs, 69 Pa., S. 43.

Martin vs. Trav. Ins. Co., 1 Fand., F. 505.

May on Ins. 514.

An accident is defined by the books to be "an injury from any unexpected event which happens as by chance or which does not take place according to the usual course of things."

May 514.

No one would hardly contend that to jump downwards 4 or 5 feet and alight on one's heels would be an event happening in the usual course of things, when our own experience teaches us the opposite.

Upon the whole testimony it was left with the jury to say whether Dr. Barry jumped and alighted as he intended or as men ordinarily do, or whether he did not, as is very apparent, miscalculate the distance and thereby alight so as to receive the jar that produced the fatal results described in this record.

That the external and visible signs of this injury within the guarded language of the policy existed admits of no doubt. The closing of the duodemun caused the vomiting; the yellow jaundice; the bloody ooze and fœcal matter described by the attending physicians (folios 66, 67, 79, 80, 84).

It has been held that bleeding at the nose or passing blood is a sufficient external sign within the requirements of these steel begirt policies.

Whitehouse vs. Travelers Co, 7 Ins., L. J. 23.

IV.

PLAINTIFF NOT ENTITLED TO RECOVER AT LAW WITHOUT PROVING AN ASSESSMENT OF THE MEMBERS OF DEFENDANT CORPORATION.

This statement is based upon the theory that in the policy plaintiff in error did not promise to pay but only promised to make an assessment.

The policy (fol. 4) after declaring the acceptance of Dr. Barry in Class AA, continues as follows: "The principal sum represented by the payment of two dollars by each

member in division *AA* of the Ass'n, as provided in the by-laws (which sum however is not to exceed $5,000) to be paid to Theresa A. Barry (his wife), etc.

This is what counsel interpret as meaning a promise to make an assessment only. A reference to the by-laws will not aid us for they only define the "machinery" by which the Ass'n expects to raise its revenue with which to pay (folio 54), viz: by assessment. We must therefore look alone to the policy for its meaning. It does not directly or indirectly promise to make an assessment upon proof of a death. It promises to pay a sum of money indefinite except as to its maximum limit of $5,000, the exact sum in extent is to be the amount represented by an assessment of $2 per member of all in Class *AA* within the above limits. This language takes for granted that the assessment will be paid to the Ass'n by its members, and hence they have not made that fact a condition of the policy. In other words the assured has nothing to do with the assessments one way or the other, except as determining the limit of the amount to be paid. The amount to be paid under the policy is not made to depend upon the assessments being made or paid, but upon the liability to assessment of the members in Class *AA*.

It is difficult to see how there is any mystery or doubt about the real meaning of the policy and hence we need not invoke the well settled rule of law that in cases of doubt the policy shall be interpreted most strongly against the company whose contract it is.

45 Wis., 641.

But conceding for the sake of argument that this policy only promises to make an assessment the defendant would

still be liable in an action at law on its guaranties and for damages for refusal or neglect to make an assessment.

In re Protection L. I. Co., 9 Bissel, 198.

Lueders, Exr., vs. Hartford Life, 12 Fed. Rep., 465.

We have been unable to find a single case where any different rule was laid down than is indicated in the above authorities.

We therefore submit that this writ of error has no merit in it whatever and was manifestly taken for the purpose of delay and to worry a poor heart-broken widow into some ignominious concessions of disastrous compromise.

We therefore ask that the judgment below be affirmed and that the usual penalty, where the appeal is for delay, be applied to the plaintiff in error and that the defendant in error have costs.

GEO. McWHOETER,

Feb. 1, 1889. *Att'y for Deft. in Error.*

C. M. BICE, of Counsel.